Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CHRISTOPHER ARTUZ, Superintendent,
Green Haven Correctional Facility,
Petitioner,

- against -

ADALBERTO FERNANDEZ,
Respondent.

(Additional Rule 12.4
joined matters listed within)

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Absent a 28 U.S.C. section 2253(c) certificate of appealability, does a Circuit Court of Appeals have jurisdiction to vacate a judgment of the District Court entered in a 28 U.S.C. section 2254 proceeding?

2. Does a federal court have the jurisdiction to consider a state prisoner's 28 U.S.C. section 2254 habeas corpus application if that application is barred by the terms of 28 U.S.C. section 2244(d)?

LIST OF PARTIES

In connection with the captioned matter, Christopher Artuz, Superintendent, Green Haven Correctional Facility, was the respondent in the Second Circuit Court of Appeals (COA2 Dkt. 98-2574), and is the petitioner herein. Adalberto Fernandez was the petitioner-appellant in the Second Circuit Court of Appeals, and is the respondent herein.

Pursuant to Rule 12.4, we seek a petition, in addition to the above matter, on behalf of the indicated petitioners in the matters below against the respondents indicated below, in connection with orders issued by the Second Circuit Court of Appeals because they "involve identical or closely related questions" arising out of separate orders issued on September 25, 1998:

1. Christopher Artuz, Superintendent, Green Haven Correctional Facility, Petitioner v. Lorenzo Brooks, Respondent (COA2 Dkt. 98-2341)

2. Christopher Artuz, Superintendent, Green Haven Correctional Facility, Petitioner v. David Sosa, Respondent (COA2 Dkt. 98-2107)

3. James Stinson, Superintendent, Great Meadow Correctional Facility, Petitioner v. Luis Avincola, Respondent (COA2 Dkt. 97-2925)

4. James P. Keane, Superintendent, Sing Sing Correctional Facility, Petitioner v. Kevin Brannigan, Respondent (COA2 Dkt. 2051)

5. Daniel Senkowski, Superintendent, Clinton Correctional Facility, Petitioner v. Timothy Kirby, Respondent (COA2 Dkt. 97-2536)

6. Walter Kelly, Superintendent, Attica Correctional Facility, Petitioner v. Rafael Oppenheimer, Respondent (COA2 Dkt. 97-2574)

7. Hans G. Walker, Superintendent, Auburn Correctional Facility, Petitioner v. Eduardo La Torres, Respondent (COA2 Dkt. 97-2795)

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Associate Justices
of the Supreme Court:

PRELIMINARY STATEMENT

Robert M. Morgenthau, District Attorney, New York County, a real party in interest as the prosecuting authority in each of the within cases and as attorney, on behalf of various superintendents of correctional facilities within the State of

New York, seeks a writ of certiorari to review orders issued September 25, 1998, by the United States Court of Appeals for the Second Circuit. These orders vacated final judgments dismissing 28 U.S.C. section 2254 applications for writs of habeas corpus.

OPINIONS BELOW

Each of the contested orders of the United States Court of Appeals for the Second Circuit vacated a judgment of the District Court for the Southern District of New York. Each judgment had dismissed a habeas corpus application brought by a state prisoner. The orders are set forth in the accompanying appendix ("Pet.App.") at pages Pet. App. 1a, 9a, 20a, 32a, 41a, 56a, 63a, 70a, and are unreported.

The accompanying appendix also contains the District Court opinions and orders.

The District Court opinion and order denying respondent Adalberto Fernandez's habeas corpus application is at Pet. App. 3a-6a and is reported at 1998 U.S.Dist.LEXIS 4357. The District Court order denying a certificate of appealability is at Pet. App. 7a-8a and is unreported.

The District Court opinion and order denying respondent Lorenzo Brooks's habeas corpus application and a certificate of appealability is at Pet. App. 11a-19a and is reported at 1998 U.S.Dist.LEXIS 947.

The District Court report and recommendation

recommending denial of respondent Davis Sosa's habeas corpus application and a denial of a certificate of appealability is at Pet. App. 22a-29a and the District Court order adopting that recommendation is at Pet. App. 30a-31a and are unreported.

The District Court opinion and order denying respondent Luis Avincola's habeas corpus application and a certificate of appealability is at Pet. App. 34a-40a and is reported at 1997 U.S.Dist.LEXIS 17078.

The District Court report and recommendation recommending denial of respondent Kevin Brannigan's habeas corpus application and a denial of a certificate of appealability is at Pet. App. 43a-53a and the District Court order adopting that recommendation and denying a certificate of appealability is at Pet. App. 54a-55a and are unreported.

The District Court decision and order denying respondent Timothy Kirby's habeas corpus application is at Pet. App. 58a-60a and is reported at 1997 U.S.Dist.LEXIS 10167 and the decision and the District Court order denying a certificate of appealability is at Pet. App. 61a-62a and is reported at 1997 U.S.Dist.LEXIS 11895 and are unreported.

The District Court decision and order denying respondent Rafael Oppenheimer's habeas corpus application is at Pet. App. 65a-67a and is reported at 1997 U.S.Dist.LEXIS 8975. The decision and the District Court order denying a certificate of appealability is at Pet. App. 68a-69a and is reported at 1997 U.S.Dist.LEXIS 12400.

The District Court decision and order denying respondent Eduardo La Torres's habeas corpus application and a certificate of appealability is at Pet. App. 72a-77a and is reported at 1997 U.S.Dist.LEXIS 14931.

JURISDICTION

Each of the orders of the Court of Appeals at issue was entered on September 25, 1998.

The Court's jurisdiction is being invoked under 28 U.S.C. section 1254, and Rules 13.1 and 12.4 of the Rules of the Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.Const. art. III, §1 provides, in pertinent part:

> The judicial Power of the United States, shall be vested in one supreme Court, an in such inferior Courts as the Congress may from time to time ordain and establish.

28 U.S.C. section 2244(d)(1) provides, in pertinent part:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a

person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of

due diligence.

28 U.S.C. section 2253(c) provides, in pertinent part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court
> > * * * *
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

In each of the cases herein, a state prisoner sought habeas corpus relief pursuant to 28 U.S.C. section 2254, and, in each case, the application was brought after April 24, 1996. In each case, a judge of the District Court dismissed

the application on the ground that it was untimely under 28 U.S.C. section 2244(d). And, in each case, no certificate of appealability was issued by the relevant judge of the District Court.

But, in each case the state prisoner thereafter requested a certificate of appealability from the United States Court of Appeals for the Second Circuit, either by formal application or by the filing of a notice of appeal treated by the Second Circuit as a request for such a certificate. See Fed.R.App.Proc. 22(b).

While these applications were pending, the Second Circuit, in Ross v. Artuz, 150 F.3d 97 (1998), judicially created a one-year grace period, retroactive to the April 24, 1996, effective date of the AEDPA. Under that rule, no habeas corpus application brought before April 24, 1997, was to be dismissed by application of section 2244(d).

On September 25, 1998, the Second Circuit issued the orders at issue.[1] In each order, the Second Circuit denied the state prisoner's request for certificate of appealability. Nevertheless, the Second Circuit, in each case, then vacated the judgment of the District Court at issue and directed further proceedings in the District Court. Typical of the orders is the one issued in connection with respondent Adalberto:

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[1]These were not the only similar orders issued by the Second Circuit on September 25, 1998; however, the orders joined in this petition provide a representative group.

> Motions having been made herein by petitioner for a certificate of appealability and in forma pauperis status, upon consideration thereof, it is ordered that said motions be and they hereby are denied as moot. In light of this Court's recent decision in Ross v. Artuz, ___ F.3d ___, 1998 WL 400446 (2d Cir. June 24, 1998), the district court's dismissal of petitioner's § 2254 petition as time barred under 28 U.S.C. § 2244(d)(i) is vacated and the matter is remanded to the district court for further proceedings.

(Pet. App. 1a-2a).

REASONS FOR GRANTING THE WRIT

WHETHER THE SECOND CIRCUIT HAS ARROGATED TO ITSELF JURISDICTION DENIED IT BY CONGRESS OVER THE CUSTODY OF STATE PRISONERS PRESENTS ISSUES WORTHY OF REVIEW.

By virtue of the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"), Congress imposed two limitations, relevant here, on Article III courts. First, under 28 U.S.C. section 2253(c) Congress limited the appellate jurisdiction of the Circuit Courts to only District Court judgments in which the state prisoner could make a "substantial" demonstration that he or she had been "den[ied] ... a constitutional right." Second, under 28 U.S.C. section 2244(d) Congress denied the federal courts authority to grant habeas corpus relief on dormant claims.

The first important question presented by this case is whether a Circuit Court may in the absence of a certificate specifying that a "substantial showing of the denial of a constitutional right" has been made by the state prisoner, exercise appellate jurisdiction. Here, the Second Circuit exercised appellate jurisdiction, and vacated judgments of the District Court, solely on the basis of a perceived error by the District Court in construing and applying a federal statute.

The second question is whether the Second Circuit's determination that there was an error of statutory interpretation is based upon a fundamental misconstruction of

section 2244(d), and a misapplication of this Court's precedents in Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997) and Landgraf v. USI Film Products, 511 U.S. 244, 273-275 (1994).

These questions raise important issues concerning the dignity of the States, the nature of habeas corpus evaluation, and whether the protections provided to the States by the Congress in 1996 have been correctly watered-down by judicial improvisation.

A.

EXERCISING APPELLATE JURISDICTION WITHOUT COMPLYING WITH 28 U.S.C. SECTION 2253(c) LEAVES THE LAW IN SUBSTANTIAL CONFUSION.

The Second Circuit, simply put, has ignored the limits placed upon its appellate authority by the Congress in these cases. By vacating the judgment of the District Court, the Second Circuit undoubtedly exercised appellate jurisdiction. But it did so in the absence of the certification required of it by Congress. In fact, in each case the Second Circuit denied the certificate of appealability applied for by the state prisoner. Nevertheless, the Second Circuit, in each case, upset a final judgment of the District Court.

Even were one to treat the Second Circuit's vacatur orders as the equivalent of certificates of appealabiiity, the vacatur orders relied upon and pointed to only a

nonconstitutional issue, i.e., whether there had been a violation of a judicial rule established by the Second Circuit after the entry of the District Court judgments. Section 2253(c)(2), however, facially precludes appellate jurisdiction in section 2254 habeas corpus proceedings absent a determination that there is, in fact, a "substantial showing" of the "denial of a constitutional right." Section 2253(c)(2) specifically makes this showing an obligation of the state prisoner. Further, section 2253(c)(3) requires that the certificate of appealability "shall indicate which specific issue or issues" satisfy that showing. Here, the Second Circuit exercised appellate authority without meeting that Congressional mandate.[2]

Every action by a federal court that prolongs uncertainty over the validity of the state's conviction of a criminal perpetuates a tension between the State's reasonable expectation in the finality of its judgments and the Congressionally-granted authority of the federal courts to intervene in those convictions collaterally. Each application brought under section 2254 burdens the State, diverting it from its obligations to its citizens by requiring it to defend its conduct to federal jurists. Those burdens are not insignificant. More than once, the Court has observed:

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[2]It is difficult to discern what other source of authority the Second Circuit might have possessed. The All Writs Act, 28 U.S.C. section 1651, certainly could not have been utilized to avoid the consequences of the limitations on jurisdiction posed by 28 U.S.C. section 2253(c). See Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34, 42 (1985).

> When the process of direct review -- which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials.

Brecht v. Abrahamson, 507 U.S. 619, 633 (1993), quoting Barefoot v. Estelle, 463 U.S. 880, 887 (1983). State prisoners, however, continue to treat section 2254 proceedings as second appeals, and federal courts have done little to protect the States from the burdens and costs imposed by what amounts to defending against a second round of appeals.[3]

Congress in 1996 brought a measure of balance to that tension, providing, through section 2253(c), that the burdens upon the State by the prospect of federal appellate authority and the continuation of federal evaluation require more than

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[3]As the District Court opinions in the cases here illustrate, the state prisoners treat virtually every claim presented in the state courts as fodder for habeas corpus evaluation. See Pet. App. 12a, 16a, 25a, 36a, 48a, 73a-74a.

a determination of federal procedural error. Congress, revising the prior certificate of probable cause procedures, required that, for a state prisoner to obtain the exercise of appellate authority, he or she most do more than articulate a colorable claim. Rather, Congress required that the prisoner make a demonstration, indeed, "a substantial showing" that the prisoner, in fact, has been denied a "constitutional" right by the State. A dispute over a procedural matter, in other words, does not support appellate jurisdiction, at least absent a credible claim that the state custody truly derives from the deprivation of a constitutional right by the State. And, to insure that the jurisdictional prerequisite to appellate authority was taken seriously by the federal courts, Congress mandated that the implicated constitutional right be "specified" in the certification.

Congress's facial effort to protect the States from burdensome litigation was ignored by the Second Circuit in the issuance of its September 25, 1998, orders. The source of the Second Circuit's authority to vacate District Court judgments is utterly unclear, and the extent of a Circuit Court's authority to act in section 2254 proceedings in the absence of a certificate of appealability meeting the requisites of section 2253 should be clarified.

The Fifth Circuit has correctly described the two-step process applicable to certificate of appealability when dismissal is premised on a nonconstitutional ground. First, the state prisoner must make a credible showing that the District Court has erred on the nonconstitutional ground. Second, the state prisoner must make a substantial showing that one or more of the underlying claims reflects the denial

of a constitutional right. Murphy v. Johnson, 110 F.3d 10, 11 (5th Cir. 1997); Robison v. Johnson, 151 F.3d 256, 263 (5th Cir. 1998). Unfortunately, the Fifth Circuit has recently held that it need not reach the second step, the very finding required by Congress to be certified, if the first step reveals a mistake. Whitehead v. Johnson, 157 F.3d 384, 388 (5th Cir. 1998). The Seventh Circuit, while recognizing the difference between a statutory error and a constitutional error, has determined that a defective section 2253(c) certificate does not deprive it of appellate jurisdiction over the judgment of the District Court. Young v. United States, 124 F.3d 794 (7th Cir. 1997), cert. denied, 118 S.Ct. 2324 (1998).

The Fifth Circuit's initial analytical approach, as stated in Murphy, fully implements section 2253(c); its actual implementation of section 2253(c), as stated in Whitehead, viscerates the protection provided the States by section 2253(c), and leaves the meaning of section 2253(c) in limbo. The Seventh Circuit's approach only adds to that confusion, as it would permit appellate jurisdiction in the face of concededly improper certifications. Certainly, that could not have been the intent of Congress.

Recently, the Court addressed a fundamental issue concerning its own jurisdiction in light of the AEDPA, and concluded that an application for a certificate of appealability sufficiently puts a case "in" a Circuit Court to enable certiorari jurisdiction over a denial of a certificate. Hohn v. United States, 118 S.Ct. 1969 (1998). This case raises an equally important question concerning to what extent section 2253(c) limits the jurisdiction of the Circuit Court, and what jurisdiction a Circuit Court possesses when the requisites of

section 2253(c) are ignored.

B.

WHETHER FEDERAL COURTS ARE FREE TO ENLARGE THE LIMITATION PERIODS SET BY CONGRESS PRESENTS AN ISSUE IMPORTANT TO THE STATES.

The procedural ground relied upon by the Second Circuit to vacate the District Court judgments, of itself, presents an important question arising from the Second Circuit's orders. 28 U.S.C. section 2244(d)(1) facially precludes relief if the habeas corpus application has not been brought within one year of the latest of four specified dates.[4] In Ross v. Artuz, 150 F.3d 97 (2d Cir. 1998), the Second Circuit adopted a rule that no habeas corpus application brought by a state prisoner on or before April 24, 1997, would be dismissed regardless of what section 2244(d) otherwise provides.

On this issue, the Second Circuit has certainly not been the only Circuit Court to believe it had the right to diverge from the temporal limits Congress placed on obtaining evaluation of claims. Brown v. Angelone, 150 F.3d 370 (4th Cir. 1998); Burns v. Morton, 134 F.3d 109 (3rd Cir. 1998);

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[4]Congress provided for specific and limited tolling in connection with the one-year period under 28 U.S.C. section 2244(d)(2).

Calderon v. United States District Court (Beeler), 128 F.3d 1283 (9th Cir. 1997), cert. denied, 118 S.Ct. 1389 (1998); United States v. Flores, 135 F.3d 1000 (5th Cir. 1998); Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996)(en banc), reversed on other grounds, 117 S.Ct. 2059 (1997).[5] But that the Second Circuit is not alone does not make the issue any less substantial because the path that the Circuit Courts have chosen appears to conflict with the analysis established by prior decisions of this Court.

Had Congress wanted, section 2244(d) easily could have provided for a limitations period based upon the effective date of the AEDPA. Congress did not do so. The section 2244(d) statutory scheme would seem explicit -- if a state prisoner's claims had been dormant for more than one year after the latest of the four specified events provided for by section 2244(d), consideration of the merits of a habeas corpus application is barred. By not applying section 2244(d)

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[5]While concededly the prevailing view of federal jurists, and apparently the only view of the Circuits Courts, not all federal jurists have so understood the AEDPA. See Person v. United States, 1998 U.S.Dist.LEXIS 9699 (D.R.I. Apr. 21, 1998) (Magistrate Judge's Report), habeas denied on other grounds, 1998 U.S.Dist.LEXIS 17951 (D.R.I. Nov. 12, 1998); Kile v. Trent, 1998 U.S.Dist.LEXIS 4752 (N.D.W.Va. Mar. 30, 1998), vacated, 1998 U.S.App.LEXIS 21389 (4th Cir. Aug. 31, 1998); United States v. Smith, 966 F.Supp. 408 (E.D.Va. 1997); Clarke v. United States, 955 F.Supp. 593 (E.D.Va. 1997), vacated, 1998 U.S.App.LEXIS 21534 (4th Cir. Sept. 2, 1998; Curtis v. Class, 939 F.Supp. 703 (D.S.Dak.1996).

to habeas corpus applications brought after April 24, 1996, the Second Circuit has ignored the Congressional intent identified by the Court in Lindh.

In Lindh, the Court faced a habeas corpus application brought prior to the AEDPA's effective date. The core issue was whether the AEDPA's non-capital case provisions were to be applied to that application. Four justices found no statutory reason to preclude application of the AEDPA's provisions, and found no constitutional infirmity to such application. 521 U.S. at ___, 117 S.Ct. at 2070-2071.

Of course, five justices did not reach that question. The reason for that is significant. Five justices found a legislative intent that limited application of the non-capital case AEDPA's provisions to section 2254 proceedings only brought after the April 24, 1996, effective date of the AEDPA. 521 U.S. at ___, 117 S.Ct. at 2063.

That legislative intent would seemingly compel application of section 2244(d) to section 2254 proceedings brought after April 24, 1996. In fact, with that legislative intent determined, the only reason to recognize, judicially, any grace period in section 2254 proceedings brought after April 24, 1996, would be that the alternative results in an improper retrospective impact. Landgraf v. USI Film Products, 511 U.S. at 273-275. Four members of this Court, in Lindh, however, rejected such a result even as to habeas corpus applications brought prior to April 24, 1996. And, not one of the five members of the majority questioned that understanding -- differing solely on the question of whether Congress intended to apply the provisions of the AEDPA to

non-capital habeas corpus proceedings already pending when the AEDPA became effective.

Landgraf establishes that no retrospective impact exists in the immediate application of legislation that essentially alters the forum that resolves the core controversy or in legislation that impacts upon equitable relief. 511 U.S. at 273-274. The change wrought by section 2244(d) meets both criteria.

Section 2244(d) impacts only upon the final arbiter of constitutional issues. Without the availability of 28 U.S.C. section 2254 proceedings, constitutional claims may still be litigated, but the final arbiter becomes this Court on certiorari review of the state court determinations, rather than this Court on certiorari review of section 2254 proceedings. There is no change in the right to have a judicial examination of the constitutional right claimed to have been denied. Thus, no state prisoner, by virtue of section 2244(d) has lost the right to a properly requested judicial evaluation of constitutional error -- all that is changed where there are stale claims is that what Barefoot, 463 U.S. at 887 described as the "secondary and limited" right to a second bite of the apple is denied. Modifications that affect forums do not create retrospective applications. See Hallowell v. Commons, 239 U.S. 506, 508-509, 36 S.Ct. 202 (1916); see also Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 117 S.Ct. 1871, 1878 (1997) ("Statutes merely addressing which court shall have jurisdiction to entertain a particular cause of action can fairly be said to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties").

Independently, habeas corpus is simply not civil litigation akin to damage lawsuits over the violation of prior established rights. Thus, likening section 2244(d) to statutes of limitations in property and contract disputes would not be appropriate. What is sought in habeas corpus amounts to an injunction against the prisoner's continued future custody. See Lane v. Williams, 455 U.S. 624, 631 (1982). Statutory changes concerning the authority to grant prospective, injunctive-type relief do not act retrospectively even if the relevant facts pre-date the legislative change. Landgraf, 511 U.S. at 273-274.

In fact, a conclusion that a state prisoner may not complain about changes in his ability to obtain federal habeas corpus relief matches established principles already announced by the Court in other aspects of habeas corpus jurisprudence. After all, a habeas corpus applicant will not "ordinarily have any claim of reliance on past judicial precedent;" thus, habeas corpus relief is not authorized if the disputed conduct violated constitutional principles as understood when the conduct occurred, but is no longer deemed unconstitutional when the habeas corpus application is brought. Lockhart v. Fretwell, 506 U.S. 364, 373 (1993).

* * *

The Court has long recognized that the habeas corpus power enjoyed by the federal courts by virtue of Congressional authority creates a tension with the States. In 1996, Congress sought to ease that tension by limiting that federal gateway through means that would diminish the routine usage of habeas corpus as a second appeal, but not

terminate its vitality in the event of a true denial of some fundamental constitutional right. Congress sought to deny state prisoners the privilege of pursuing dormant claims, and sought to limit appellate consideration of dismissed habeas corpus applications, unless the prisoner could demonstrate, not merely articulate, a credible claim of a constitutional denial by the State. Those initiatives are placed in considerable jeopardy by the orders contested.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court should either summarily vacate the September 25, 1998, orders of the Second Circuit Court of Appeals or direct full briefing and argument on the issues presented in this petition.

Respectfully submitted,

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December 23, 1998

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of September one thousand nine hundred and ninety-eight,

Present:

Hon. Thomas J. Meskill,
Hon. Pierre N. Leval,
Hon. Chester J. Straub,
Circuit Judges

99-2574

Adalberto Fernandez,

Petitioner,

v.

Christopher Artuz, Superintendent,
Green Haven Correctional Facility

Respondent.

Motions having been made herein by petitioner for a certificate of appealability and in forma pauperis status, upon consideration thereof, it is ordered that said motions be and

they hereby are denied as moot. In light of this Court's recent decision in Ross v. Artuz, ___ F.3d __, 1998 WL 400446 (2d Cir. June 24, 1998), the district court's dismissal of petitioner's § 2254 petition as time barred under 28 U.S.C. § 2244(d)(1) is vacated and the matter is remanded to the district court for further proceedings.

FOR THE COURT:
Carolyn Clark Campbell, Clerk

By: /s/Lucille Carr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 2989 (MGC)

ALDALBERTO FERNANDEZ,

Petitioner,

-against-

CHRISTOPHER ARTUZ, SUPERINTENDENT OF GREEN HAVEN CORRECTIONAL FACILITY,

Respondent.

MEMORANDUM OPINION AND ORDER

CEDARBAUM, J.

Adalberto Fernandez, a person in custody pursuant to the judgment of a state court, petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent moves to dismiss the petition as time-barred. For the reasons set forth below, respondent's motions is granted, and the petition is dismissed.

The Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), effective April 24, 1996, amended 28 U.S.C. § 2244 to add the following time limitation:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

The statute's tolling provision is as follows:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the perinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2).

On November 30, 1988, petitioner was sentenced on two counts of murder in the second degree, after a jury trial in the Supreme Court of the State of New York, New York County. On October 13, 1992, the Appellate Division, First Department, unanimously affirmed the judgment of conviction. On January 19, 1993, the New York Court of Appeals denied petitioner leave to appeal. People v. Fernandez, 186 A.D.2d 409, 588 N.Y.S.2d 1014 (N.Y. App. Div. 1992), lv. denied, 81 N.Y.2d 788, 594 N.Y.S.2d 734 (N.Y. 1993).

In papers dated March 16, 1993, petitioner moved pursuant to N.Y.C.P.L. § 440.10 to vacate the judgment of conviction. (Resp't Ex. E.) The state trial court denied this motion on May 12, 1993. (Resp't Ex. H.) Permission to appeal from this order was denied on October 28, 1993. People v. Fernandez, ___ A.D.2d ___, M-5417 (order of Appellate Division, entered October 28, 1993). (Resp't Ex. K.)

On April 14, 1997, the Office of the Clerk of the Southern District of New York received the current petition.

This petition is dated April 7, 1997. I treat the petition as filed on April 7, 1997. See Houston v. Lack, 487 U.S. 266, 270 (1988) (pro se habeas petitioner "filed" his appeal when he delivered the requisite papers to prison authorities for mailing).

This petition was filed more than four years after petitioner's judgment of conviction became final, three and one-half years after collateral relief was denied, and 348 days after the effective date of the AEDPA.

The Court of Appeals has held that if a petitioner has had several years to contemplate bringing a federal habeas corpus petition, it is not necessary to accord him a full year after the effective date of the AEDPA before applying the one-year statute of limitations. Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir. 1997). This petition, filed 348 days after April 24, 1996, was not filed within a reasonable period.

Since it plainly appears from the face of the petition that the petition is untimely, the petition is dismissed in accordance with Rule 4 of the Rules Governing Seciton 2254 Cases.

SO ORDERED.

Dated: New York, New York
April 2, 1998

/s/ Miriam Goldman Cedarbaum
MIRIAM GOLDMAN CEDARBAUM
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 2989 (MGC)

ALDALBERTO FERNANDEZ,

Petitioner,

-against-

CHRISTOPHER ARTUZ, SUPERINTENDENT OF GREEN HAVEN CORRECTIONAL FACILITY,

Respondent.

ORDER

CEDARBAUM, J.

Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 was denied by Order dated April 2, 1998 because the petition was barred by the one-year statute of limitations prescribed by 28 U.S.C. § 2244(d). Because petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability of the April 2, 1998 Order will not issue. Moreover, because an appeal of that Order would be frivolous, I find that there is no good faith basis for the appeal, and petitioner's

application to proceed in forma pauperis accordingly is denied.

SO ORDERED.

Dated: New York, New York
June 10, 1998

/s/ Miriam Goldman Cedarbaum
MIRIAM GOLDMAN CEDARBAUM
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of September one thousand nine hundred and ninety-eight,

Present:

Hon. Thomas J. Meskill,
Hon. Pierre N. Leval,
Hon. Chester J. Straub,
Circuit Judges

98-2341

Lorenzo Brooks,

Petitioner,

v.

Christopher Artuz, Superintendent,
Green Haven Correctional Facility,

Respondent.

Motions having been made herein by petitioner for a certificate of appealability, in forma pauperis status, and assignment of counsel, upon consideration thereof, it is

ordered that said motions be and they hereby are denied as moot. In light of this Court's recent decision in Ross v. Artuz, ___ F.3d __, 1998 WL 400446 (2d Cir. June 24, 1998), the district court's dismissal of petitioner's § 2254 petition as time barred under 28 U.S.C. § 2244(d)(1) is vacated and the matter is remanded for a determination of (1) whether petitioner timely filed his petition with prison officials on or before April 24, 1997, see Houston v. Lack, 487 U.S. 266 (1988); Dory v. Ryan, 999 F.2d 679 (2d Cir. 1993), modified on other grounds, 25 F.3d 81 (2d Cir. 1994), and (2) if the petition was timely filed, for a decision on the petition.

FOR THE COURT:
Carolyn Clark Campbell, Clerk

By: /s/ Lucille Carr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 3300 (JGK)

LORENZO BROOKS,

Petitioner,

-against-

CHRISTOPHER ARTUZ, Superintendent
Green Haven Correctional Facility,

Respondent.

OPINION AND ORDER

JOHN G. KOELTL, District Judge:

The respondent, Christopher Artuz, Superintendent, Green Haven Correctional Facility, has moved to dismiss this habeas corpus petition on the ground that the claims asserted by the petitioner are barred by the one-year limitations period established in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and the petitioner has responded to that motion. For the reasons explained below, the respondent's motion is granted because the petitioner did not file his application within a "reasonable time" after the effective date of AEDPA.

I.

On January 9, 1987, the petitioner was convicted after a jury trial in New York State Supreme Court, New York County, of two counts of murder in the second degree. The petitioner was sentenced to two concurrent indeterminate prison terms of twenty years to life. The Appellate Division, First Department, affirmed the petitioner's conviction on February 5, 1991. People v. Brooks, 170 A.D.2d 182, 565 N.Y.S.2d 491 (1st Dep't 1991). The New York Court of Appeals denied the petitioner leave to appeal on April 19, 1991. People v. Brooks, 72 N.Y.2d 958, 570 N.Y.S.2d 492 (1991). The petitioner brought a collateral attack in state court to vacate the judgment of conviction prior to the conclusion of his direct appeal. On May 14, 1987, the New York State Supreme Court, New York County, denied the petitioner's motion. The Appellate Division, First Department, denied the petitioner leave to appeal on September 15, 1987, and the New York Court of Appeals denied the petitioner leave to appeal on October 21, 1987.

The petitioner's habeas corpus petition to this Court raises four issues: (1) the prosecution's alleged failure timely to disclose exculpatory evidence; (2) the trial court's refusal to allow a law enforcement official to testify as a defense witness; (3) the trial court's failure to charge that the witness was an accomplice as a matter of law, or in the alternative, to submit to the jury the factual question of whether a key prosecution witness was an accomplice; and, (4) the allegedly improper admission of testimony regarding the petitioner's alleged involvement in other uncharged crimes.

II.

AEDPA, which became effective on April 24, 1996, imposed a one-year statute of limitations for the filing of a federal habeas corpus petition seeking relief from a state court conviction. This one-year period runs generally from the date that direct review of a petitioner's conviction is completed in state court. See 28 U.S. C. § 2244(d)(1). AEDPA excludes the time during which a properly filed application for state post-conviction review is pending for purposes of calculating the one-year period. See 28 U.S.C. § 2244(d)(2). However, AEDPA does not include its effective date as one of the benchmarks from which the statute of limitations is to be measured.

The Court of Appeals for the Second Circuit has recognized that there is "no indication that Congress wished to cut off access to federal courts by state prisoners who lacked notice of the new limitation period." Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir. 1997) (internal quotation marks omitted). Accordingly, the Court of Appeals has held that petitions filed more-than one year after termination of state court proceedings but within a "reasonable time" after April 24, 1996 are timely filed under AEDPA's statute of limitations. Id. Although the Court of Appeals has not defined the standards to be used in determining the "reasonable time" after the effective date of AEDPA within which a petitioner should file a petition, it explained in Peterson that:

> [W]here a state prisoner has had several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year after the effective date of AEDPA. At the

> same time we do not think that the alternative of a reasonable time should be applied with undue rigor.

Id. (emphasis added). Thus, it is clear that the longer a petitioner waits after the date of his conviction and the closer to April 24, 1997 he waits to file his petition, the more likely it is that the petitioner has not filed within a reasonable time.

Following the Court of Appeals' guidance, district courts in the Second Circuit have dismissed as untimely a petition filed near the end of the year after AEDPA's effective date when the petitioner had sufficient time after his conviction to contemplate such a filing. See, e.g., Alexander v. Keane, No. 97 Civ. 2526, 1998 WL 17737 (S.D.N.Y. Jan. 16, 1998); Albert v. Strack, No. 97 Civ. 2978, 1998 WL 9382, *2 (S.D.N.Y. Jan. 13, 1998) (collecting cases); Noble v. Kelly, No. 97 Civ. 6907, 1998 WL 8992, *1 (S.D.N.Y. Jan. 7, 1998); Esquilin v. Artuz, No. 97 Civ. 3310, 1998 WL 2827 (S.D.N.Y. Jan. 6. 1998); Yeung v. Artuz, No. 97 Civ. 3288, 1997 WL 572908, *2 (S.D.N.Y. Sept. 10, 1997) ("Every other decision of this Court (of which the Court is aware) has found March-April 1997 petitions to be untimely under the AEDPA's one-year limitation as interpreted by Peterson.") (quoting a Report and Recommendation by Magistrate Judge Peck).

In this case, the petitioner's federal habeas corpus petition was deemed filed on April 15, 1997, at the earliest,[1]

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[1]Where a prisoner is proceeding pro se, he is deemed to have filed a document when it is delivered to prison (continued...)

nearly twelve months after the effective date of AEDPA. Moreover, about six years had passed since the petitioner's state court conviction had become final when he made his application to this Court. As discussed above, numerous other cases in this district have found similar delays in filing to be unreasonable. Thus, this petition should be dismissed as untimely unless the petitioner can point to special circumstances that prevented him from filing within a reasonable period of time.

III.

"Generally speaking, petitions filed within a month or two of the one-year anniversary of AEDPA have been presumed untimely absent compelling explanation." Albert, 1998 WL 9382 at *3. "[T]he district courts applying Peterson have relied on a number of common factors in making their analysis" of whether a federal habeas corpus petition is filed within a reasonable time after the effective date of AEDPA. Id. These factors include: (1) whether the federal petition merely restates claims made to the state courts, and thus does not require extensive additional preparation; (2) whether the petitioner is proceeding pro se or

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[1](...continued)
authorities for forwarding to the Clerk of the Court. See Houston v. Lack, 487 U.S. 266 (1988). Here, the petition was received by the Pro Se Office on April 25, 1997. While there is no indication when this petition was delivered to prison authorities, it is dated April 15, 1997. Thus, the Court will consider April 15, 1997, the earliest possible effective filing date that could be considered, to be the filing date for purposes of this motion.

is represented by counsel; (3) whether the petitioner was pursuing state collateral relief during the post-AEDPA period; and (4) the difficulty or complexity of the issues raised by the petition. See id. In this case, in responding to the motion to dismiss, the petitioner has failed to identify any special circumstances that show that his delay in filing was "reasonable."

The claims raised in this petition are identical to those raised in the petitioner's state court proceedings. Indeed, the petitioner's application to this Court simply copies the topic headings and portions of briefs that were previously filed on his behalf. Moreover, the petitioner does not raise in his application any claims of unusual complexity. Thus, it is plain that the petitioner's preparation of the application without the assistance of counsel did not adversely affect his ability to file at an earlier time than he did. Further, the petitioner had nearly six years following the date his conviction became final to contemplate the filing of a federal habeas corpus petition. In this case, the only post-conviction collateral relief pursued in state court was completed several years before the completion of direct review proceedings. Accordingly, there are no special factors that show that the petitioner's delay in filing was reasonable in this case.[2]

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[2]The petitioner also claims that he relied on the decisions of courts in other circuits that afford petitioners a full year after the enactment of AEDPA to bring a federal habeas corpus petition. See. e.g., Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996)(en banc), rev'd on other grounds, ___ U.S. ___, 117 S.Ct. 2059 (1997).

(continued...)

Thus, the petitioner's filing of a federal habeas corpus petition nearly one year after the effective date of AEDPA, and over five years after the conclusion of direct state review, is "unreasonable" under the Court of Appeals, holding in Peterson and is barred under AEDPA's statute of limitations.

IV.

The petitioner argues that application of AEDPA's one-year statute of limitations to dismiss his petition is unconstitutional. He relies upon Judge Sweet's decision in Rosa v. Senkowski, No. 97-2468, 1997 WL 436484 (S.D.N.Y. Aug. 1, 1997), certified for interlocutory appeal, 1997 WL 724559 (S.D.N.Y. Nov. 19, 1997), appeal docketed, No. 97-2974 (2d Cir. 1997). In Rosa, Judge Sweet refused to dismiss a petition that was otherwise time-barred under Peterson and held that the imposition of time limitations is "an unconstitutional 'suspension' of the writ of habeas corpus." Id. at *7; see Montalvo v. Portuondo, No. 97

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[2](...continued)

However, no such reliance, even if true, would have justified delaying the petition in this case. AEDPA itself did not provide a one-year grace period after its enactment. Decisions by Courts of Appeals in other circuits would not be binding in this Circuit, and to accept such an argument of reliance would be to undercut the decision by the Court of Appeals for this Circuit which explicitly decided not to afford petitioners a full year after the enactment of AEDPA to file a federal habeas corpus petition. See also, Noble, 1998 WL 8992 at *1 (delay resulting from awaiting Supreme Court decisions does not constitute reasonable delay).

Civ. 3336, 1997 WL 752728 (S.D.N.Y. Dec, 4, 1997) (Sweet, J.) (reaffirming the Rosa holding).

The Court of Appeals for the Second Circuit has not yet addressed this issue. However, at least one court in this District respectfully declined to follow Judge Sweet's holdings in Rosa and Montalvo. See Rodriguez v. Artuz, No. 97 Civ. 4694, 1998 WL 9377 (S.D.N.Y. Jan. 13, 1998) (Sotomayor, J.). In Rodriguez, Judge Sotomayor found that:

> at least where no claim of actual or legal innocence has been raised, as long as the procedural limits on habeas leave petitioners with some reasonable opportunity to have their claims heard on the merits, the limits do not render habeas inadequate or ineffective to test the legality of detention and, therefore, do not constitute a suspension of the writ in violation of Article I of the United States Constitution.

Id. at *8 (holding that Peterson affords petitioners such a reasonable opportunity); see also Alexander v. Keane, No. 97 Civ. 2526, 1998 WL 17737, *4-5 (S.D.N.Y. Jan. 16, 1998) (Sotomayor, J.).

This Court follows Judge Sotomayor's thorough opinion in Rodriguez. In this case, the petitioner had over five years to file his federal habeas corpus petition and was afforded a reasonable time after the enactment of AEDPA to file. Moreover, he has failed to identify any special circumstances that show that his delay in filing was reasonable. The petitioner does not raise a claim of

innocence, and it does not appear from the record before the Court that the claims the petitioner raised were sufficient in any case to make such a claim. Indeed, the Appellate Division, when it unanimously affirmed the petitioner's conviction, explicitly found that "the evidence of guilt was overwhelming ...." Brooks, 170 A.D.2d at 183, 565 N.Y.S.2d at 492. Thus, the application of AEDPA's statute of limitations in this case to bar the petitioner's habeas corpus petition is not unconstitutional.

CONCLUSION

In this case, the petitioner waited an unreasonable length of time after the enactment of AEDPA to file his federal habeas corpus petition- Because there is no compelling explanation to excuse that delay, the respondent's motion to dismiss the petition is granted. The Court also declines to issue a certificate of appealability because the petitioner has not made a substantial showing of the denial of any constitutional right. The Clerk of this Court is directed to enter judgment dismissing the petition and closing the case.

SO ORDERED.

Dated: New York, New York
January 31, 1998

/s/John G. Koeltl
John G. Koeltl
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of September one thousand nine hundred and ninety-eight,

Present:

Hon. Thomas J. Meskill,
Hon. Pierre N. Leval,
Hon. Chester J. Straub,
Circuit Judges

98-2107

David Sosa,

Petitioner,

v.

Christopher Artuz,

Respondent.

Motions having been made herein by petitioner for a certificate of appealability, in forma pauperis status, and assignment of counsel, upon consideration thereof, it is ordered that said motions be and they hereby are denied as moot. In light of this Court's recent decision in Ross v.

Artuz, ___ F.3d __, 1998 WL 400446 (2d Cir. June 24, 1998), the district court's dismissal of petitioner's § 2254 petition as time barred under 28 U.S.C. § 2244(d)(1) is vacated and the matter is remanded to the district court for further proceedings.

FOR THE COURT:
Carolyn Clark Campbell, Clerk

By: /s/Lucille Carr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 3241 (DAB) (HBP)

DAVID SOSA,

Petitioner,

-against-

CHRISTOPHER ARTUZ, Superintendent, of Greenhaven Correctional Facility,

Respondent.

REPORT AND RECOMMENDATION

PITMAN, United States Magistrate Judge

TO THE HONORABLE DEBORAH A. BATTS, United States District Judge:

I. Introduction

David Sosa seeks, by his petition for a writ of habeas corpus under 28 U.S.C. § 2254, an order vacating a judgment of conviction imposed on June 19, 1990, after a jury trial, by the Supreme Court, New York County (Scott, J.), for murder in the second degree in violation of New York Penal Law § 125.15 (2). Pursuant to that judgment, Sosa was sentenced

to a prison term of from twenty-five (25) years to life. He is presently incarcerated pursuant to that judgment.

Respondent has answered and seeks dismissal of the petition on the ground that it is time-barred under 28 U.S.C. § 2244(d)(1). Petitioner has not submitted a traverse pursuant to 28 U.S.C. § 2248. For the reasons set forth below, I respectfully recommend that the petition be dismissed.

II. Facts

The facts relevant to the disposition of this petition can be stated briefly. Sosa was convicted on June 19, 1990 after being found guilty by a jury. The conviction was affirmed by the Appellate Division, First Department, on March 17, 1992. People v. Sosa, 181 A.D.2d 531, 581 N.Y.S.2d 38 (1st Dep't 1992). Sosa then filed a motion to reargue in the Appellate Division which was denied on May 28, 1992 (Respondent's Answer dated June 19, 1997, Ex. G). The New York Court of Appeals denied Sosa leave to appeal on June 15, 1992. People v. Sosa, 80 N.Y.2d 838, 600 N.E.2d 650, 587 N.Y.S.2d 923 (1992).

Sosa filed his petition, here, on April 17, 1997.[1] Respondent filed an answer seeking to have the petition

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[1]Sosa's petition was signed on April 17, 1997. This is the earliest date the petition could have been delivered to prison authorities by Sosa, and the earliest date on which it can be deemed filed. See Houston v. Lack, 487 U.S. 266 (1988).

dismissed as untimely pursuant to 28 U.S.C. § 2244(d)(1). Petitioner has not submitted any response to the answer.

III. Analysis

28 U.S.C. § 2244 (d) (1) , as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Public Law No. 104-132, provides a one-year statute of limitations for habeas corpus petitions:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme

> Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Petitioner relies exclusively on alleged errors that occurred during the trial and does not assert that his conviction was erroneous by virtue of a decision of the United States Supreme Court issued subsequent to his conviction. Thus, pursuant to subsection 2244 (d) (1) (A) , petitioner's one-year time period commenced running after the expiration of the time for seeking direct review of his conviction. Petitioner's time to seek a writ of certiorari to the Supreme Court expired ninety (90) days after the termination of his state appeal or September 14, 1992. Teague v. Lane, 489 U.S. 288, 305 (1989); Allen v. Hardy, 478 U.S. 255, 258 n.1 (1986). Thus, petitioner's one-year period for filing his petition would have terminated on September 14, 1993.[2]

Where, as here, a petitioner's one-year filing period terminated prior to the effective date of the AEDPA, the Court of Appeals, for the Second Circuit has held that a prisoner is entitled to a "reasonable time" after the effective date of the AEDPA -- April 24, 1996 -- to file his petition.

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[2]None of the excludable periods set forth in 28 U.S.C. § 2244(d)(2) are applicable here.

> [Wlhere a state prisoner has had several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year after the effective date of the AEDPA. At the same time, we do not think that the alternative of a "reasonable time" should be applied with undue rigor. In this case, the petition was filed 72 days after the effective date of the [AEDPA] . . . . We conclude that the filing was timely.

Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir. 1997).

The petition here was not filed until April 17, 1997 or 358 days after the enactment of the AEDPA. The overwhelming weight of authority hold that this delay exceeds the "reasonable time" permitted by Peterson. Byas v. Keane, 97 Civ. 2789 (SAS), 1997 WL 605106 (S.D.N.Y. Oct. 1, 1997) (petition filed March 19, 1997 untimely); Reynoso v. Artuz, 97 Civ. 2797 (LMM), 1997 WL 605119 (S.D.N.Y. Oct. 1, 1997) (petition filed April 4, 1997 untimely); LaTorres v. Walker, 97 Civ. 3392 (SAS), 1997 WL 605105 (S.D.N.Y. Oct. 1, 1997) (petition filed April 11, 1997 untimely); Yeung v. Artuz, 97 Civ. 3288 (HB), 1997 WL 572908 (S.D.N.Y. Sept. 10, 1997) (petition filed April 21, 1997 untimely); Morales v. Artuz,97 Civ. 3337 (HB), 1997 WL 588990 (S.D.N.Y. Sept. 9, 1997) (petition filed April 22, 1997 untimely); Roldan v. Artuz, 97 Civ. 2562 (DAB), 1997 WL 569176 (S.D.N.Y. Sept. 9, 1997) (petition filed March 18, 1997 untimely); Suarez v. Stinson, 97 Civ. 3039 (DC), 1997 WL 462012 (S.D.N.Y. Aug. 13, 1997) (petition filed April 22, 1997 untimely); Maddaloni v.

Greiner, 97 Civ. 3034 (SAS), 1997 WL 438801 (S.D.N.Y. Aug. 5, 1997) (petition filed April 17, 1997 untimely); Fabelo v. Greiner, 97 Civ. 2988 (DC), 1997 WL 433477 (S.D.N.Y. Aug. 1, 1997) (petition filed April 7, 1997 untimely); Morales V. Portuando, 97 Civ. 2559 (DC), 1997 WL 433478 (S.D.N.Y. Aug. 1, 1997) (petition filed March 25, 1997 untimely); Rosa v. Senkowski, 97 Civ. 2469 (RWS), 1997 WL 436484 (S.D.N.Y. Aug. 1, 1997) (petition filed April 8, 1997 untimely)[3]; Kirby v. Senkowski, 97 Civ. 3329 (DC), 1997 WL 399663 (S.D.N.Y. July 15, 1997) (petition filed April 15, 1997 untimely); Oppenheimer v. Kelly, 97 Civ. 3035 (DC), 1997 WL 362216 (S.D.N.Y. June 27, 1997) (petition filed April 9, 1997 untimely); Lee v. Artuz, 97 Civ. 3190 (SHS), 1997 WL 405329 (S.D.N.Y. June 24, 1997) (petition filed April 18, 1997 untimely). The cases in which petitions have been found timely have involved delays far shorter than that involved here. Rivalta v. Artuz, 96 Civ. 8043 (SAS), 1997 WL 401819 (S.D.N.Y. July 16, 1997) (petition filed six months after enactment of AEDPA timely); Ojeda v. Artuz, 96 Civ. 5900 (SAS), 1997 WL 283398 (S.D.N.Y. May 29, 1997) (petition filed 89 days after enactment of AEDPA timely); Scire v. United, 96 Civ. 3446, 1997 WL 138991 (E.D.N.Y. March 24, 1997) (petition filed 79 days after enactment of AEDPA timely)

Respondent answered more than four months ago, asserting the untimeliness of the petition. Since petitioner offers nothing in response and respondent's arguments are supported by fact and law, the petition should be dismissed as untimely.

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[3]Sosa raises none of the other arguments considered in Rosa.

IV. Conclusion

Accordingly, for the foregoing reasons, I recommend that Respondent's motion be granted and this petition be dismissed as untimely under 28 U.S. C. § 2244 (d) (1), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996.

I further recommend that, as the petition presents no question of substance for appellate review, a certificate of appealability should not be issued. 28 U.S.C. § 2253; Barefoot v. Estelle, 463 U.S. 880, 893 (1983); Lozada v. United States, 107 F.3d 1011 (2d Cir. 1997); Reyes v. Keane, 90 F.3d 676 (2d Cir. 1996); Rodriguez v. Scully, 905 F.2d 24 (2d Cir. 1990) (per curiam); Alexander v. Harris, 595 F.2d 87, 90-91 (2d Cir. 1979); Stewart v. Beto, 454 F.2d 268, 270 n.2 (5th Cir. 1971); Fabelo v. Greiner, 97 Civ. 2988 (DC), 1997 WL 401664. I further recommend that certification pursuant to 28 U.S.C. § 1915(a)(3) be issued that any appeal from this Report and Recommendation, or any Order entered thereon, would not be taken in good faith. See Coppedge v. United States, 369 U.S. 438 (1962).

V. Objections

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from receipt of this Report to file written objections. See also Fed.R.Civ.P. 6(a) and 6(e). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Deborah A. Batts, United States District Judge, 500 Pearl Street, Room 2510, and to the chambers of the undersigned, 40 Foley Square, Room 503,

New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Batts. FAILURE TO OBJECT WITHIN TEN (10) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. Thomas v. Arn, 474 U.S. 140 (1985);IUE AFL-CIO Pension Fund v. Hermann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert. denied, 115 S.Ct. 86 (1994); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir.), cert. denied, 506 U.S. 1038 (1992); Wesolek v. Canadair Ltd., 838 F.2d 55/ 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-238 (2d Cir. 1983)

Dated: New York, New York
October 30, 1997

Respectfully submitted,

/s/ Henry Pitman
HENRY PITMAN
United States Magistrate judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 3241 (DAB)

DAVID SOSA,

Petitioner,

-against-

CHRISTOPHER ARTUZ, Superintendent,
of Greenhaven Correctional Facility,

Respondent.

ADOPTION OF
REPORT AND RECOMMENDATION

DEBORAH A. BATTS, United States District Judge.

This matter is before the Court upon the October 30, 1997 Report and Recommendation of United States Magistrate Judge Henry Pitman. Petitioner filed objections to said Report and Recommendation.

The Court has conducted an independent de novo review of said Report and Recommendation and the entire court file herein. The Court having reviewed the record herein and, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. The Report and Recommendation of United States Magistrate Judge Henry Pitman dated October 30, 1997 be and the same hereby is approved, adopted, and ratified by the Court;

2. The petition for a writ of habeas corpus is hereby DISMISSED;

3. The Clerk of the Court is directed to dismiss the petition.

SO ORDERED

DATED: New York, New York
November 25, 1997

/s/Deborah A. Batts
DEBORAH A. BATTS
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of September one thousand nine hundred and ninety-eight,

Present:

Hon. Thomas J. Meskill,
Hon. Pierre N. Leval,
Hon. Chester J. Straub,
Circuit Judges

97-2925

Luis Avincola,

Petitioner-Appellant,

v.

James Stinson, Superintendent,
Great Meadow Correctional Facility

Respondent-Appellee.

Motions having been made herein by petitioner for a certificate of appealability and assignment of counsel, upon consideration thereof, it is ordered that said motions be and

they hereby are denied as moot. In light of this Court's recent decision in Ross v. Artuz, ___ F.3d __, 1998 WL 400446 (2d Cir. June 24, 1998), the district court's dismissal of petitioner's § 2254 petition as time barred under 28 U.S.C. § 2244(d)(1) is vacated and the matter is remanded to the district court for further proceedings.

FOR THE COURT:
Carolyn Clark Campbell, Clerk

By: /s/Lucille Carr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 1132 (SAS)

LUIS AVINCOLA,

Petitioner,

-against-

JAMES STINSON, Superintendent,
Green Meadow Correctional Facility,

Respondent.

OPINION AND ORDER

SHIRA A. SCHEINDLIN, U,S.D.J.:

Pro se petitioner Luis Avincola filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his 1986 conviction for Murder in the Second Degree. Respondent now moves to dismiss petitioner's habeas corpus petition as untimely. For the reasons set forth below, the petition is dismissed.

I. Procedural History

On July 25, 1986, petitioner was convicted in the Supreme Court of New York, New York County. See

Petition for Writ of Habeas Corpus ("Petition"), dated January 15, 1997 at p. 2. The court sentenced petitioner to an indeterminate prison term of 25 years to life. On March 29, 1989, petitioner filed a pro se motion for an order vacating his conviction pursuant to CPL § 440.10, alleging that he was deprived of effective assistance of counsel because his attorney had a conflict of interest. The trial judge denied petitioner's motion. The petitioner then sought leave to appeal the trial judge's decision. On July 20, 1989, the Appellate Division, First Department, denied petitioner's application for a certificate granting permission to appeal.

Petitioner then appealed his conviction to the Appellate Division, First Department, claiming that (1) evidence of uncharged crimes was improperly received; (2) the trial judge denied his motion to suppress his statements; (3) he was deprived of his right to confront prosecution witnesses; (4) the prosecution made improper comments during its opening statement; (5) his sentence was unduly harsh and excessive; (6) his arrest was unlawful; (7) evidence recovered pursuant to a search warrant was inadmissible; (8) two jurors spoke about the case with the victim's father; (9) inadmissible hearsay testimony was introduced at his trial; (10) both the police and prosecution committed acts of misconduct; (11) the trial court coerced the verdict; and (12) the trial judge was not impartial. On June 21, 1990, the Appellate Division, First Department, affirmed petitioner's conviction. See People v. Avincola, 162 A.D. 2d 288 (1st Dept. 1990). Petitioner then sought leave to appeal to the New York Court of Appeals which was denied on October 5, 1990. See People v. Avincola, 76 N.Y.2d 937 (1990).

On October 7, 1991, petitioner moved a second time for an order to vacate his conviction pursuant to CPL §

440.10. He argued that (1) the prosecutor has altered a witness's statement on appeal; (2) the people had failed to preserve evidence for review on appeal; (3) the people had failed to disclose the statements of two witnesses; (4) the people had failed to disclose petitioner's exculpatory statement at trial; (5) the prosecutor failed to disclose a witness cooperation agreement; (6) the prosecutor suggested an answer to a witness; (7) false evidence was introduced; and (8) the trial judge failed to properly charge the jury. On December 5, 1991, the trial judge denied petitioner's motion. Petitioner sought leave to appeal this decision to the Appellate Division but it was denied on May 19, 1992. Petitioner then applied for leave to appeal to the Court of Appeals which was also denied on July 24, 1992. Petitioner's final act was to move for a writ of error coram nobis, claiming ineffective assistance of appellate counsel. The Appellate Division, First Department, denied petitioner's application.

On January 28, 1997, this court received the habeas petition dated January 15, 1997. Petitioner urges that his conviction should be reversed because (1) his statements to police should have been suppressed; (2) evidence of petitioner's uncharged crimes was improperly received at trial; (3) he was deprived of his right to confront two of the government's witnesses; (4) the prosecutor made improper comments during his opening statement; (5) the prosecutor committed misconduct; (6) his conviction was based on inadmissible hearsay and circumstantial evidence and the judge erred in not giving a circumstantial evidence charge; and (7) his trial and appellate counsel were ineffective. See Petition at pp. 5, 6.

II. Discussion

Respondent has moved to dismiss Avincola's petition as untimely. The Antiterrorism and Effective Death Penalty Act ("AEDPA"), which became effective on April 24, 1996, amended 28 U.S.C. § 2244 by imposing a one-year statute of limitations for the filing of a habeas corpus petition seeking relief from a state court conviction. The limitation period, with certain exceptions, begins to run after the completion of direct review of the judgment by state courts. 28 U.S.C. § 2244(d)(1)(A). This one year limitation period does not apply in cases where, as here, the judgment of conviction became final before April 24, 1996, the effective date of AEDPA. In these circumstances, the Second Circuit has held that such a habeas petition must be filed within a "reasonable time" after that date. Peterson v. Demskie, 107 F.2d 92, 93 (2d Cir. 1997). While the Second Circuit has not defined what constitutes a "reasonable time," it stated that when a prisoner has had "several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year after the effective date of the AEDPA." Id. at 93. The Peterson court concluded that filing 72 days after AEDPA's effective date constituted a reasonable time. See id. This habeas corpus petition was filed, at the earliest, on January 15, 1997,[1] 266 days after the effective date of the AEDPA, nearly five years after the Appellate Division denied

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[1]Where a prisoner proceeds pro se, the prisoner is deemed to have filed a document when he or she delivers it to prison authorities for forwarding to the clerk of the court. See Houston v. Lack, 487 U.S. 266 (1988). Because the petition in this case was dated January 15, 1997, it could not have been delivered to prison authorities before this date.

petitioner's application to file a writ of error coram nobis. When a conviction becomes final before the effective date of AEDPA (April 24, 1996), the Court of Appeals for the Second Circuit has already held that a petitioner is entitled to a "reasonable time" subsequent to the effective date of AEDPA in which to file a habeas petition, but not an entire year. See Peterson, 107 F.3d at 93. Petitioner did not offer any reason for his delay in filing for habeas relief. His petition was filed nearly five years after the state court conviction became final. The claims raised here are identical to those raised in state court. In the absence of any credible explanation for this lengthy delay, and under the particular circumstances of this case, 266 days does not constitute a "reasonable time" within the meaning of AEDPA. Accord Palmer v. Artuz, No. 97 Civ. 5457 (S.D.N.Y. October 27, 1997) (order holding petition received 362 days after effective date of AEDPA time barred); Yeung v. Artuz, No. 97-3288, 1997 WL 572908 (S.D.N.Y. Sept. 10, 1997) (petition dated 362 days after effective date of AEDPA untimely); Roldan v. Artuz, No. 97-2562, 1997 WL 569176 (S.D.N.Y. Sept. 9, 1997) (petition dated 328 days after effective date of AEDPA time barred); Joseph v. McGinnis, No. 97-2969, 1997 WL 531312 (S.D.N.Y. Aug. 27, 1997) (petition filed 364 days after effective date of AEDPA untimely); Suarez v. Stinson, No. 97-3039, 1997 WL 462012 (S.D.N.Y. Aug. 13, 1997) (petition filed 363 days after effective date of AEDPA untimely); Fabelo v. Greiner, No. 97-2988, 1997 WL 433477, at *3 (S.D.N.Y. Aug. 1, 1997) (filing 348 days after the effective date of AEDPA untimely); Morales v. Portuondo, No. 97-2559, 1997 WL 433478, (S.D.N.Y. Aug. 1, 1997) (filing 335 days after effective date of AEDPA time barred); Oppenheimer v. Kelly, No. 97-3035, 1997 WL 362216, at *1 (S.D.N.Y. June 27, 1997) (filing 350 days after the effective date unreasonable). But

see Oleda v. Artuz, No. 97-5900, 1997 WL 283398 (S.D.N.Y. May 29, 1997) (filing 89 days after effective date of AEDPA timely); Rivalta v. Artuz, No. 97-8043, 1997 WL 401819 (S.D.N.Y. July 16, 1997 (filing six months after effective date of AEDPA is within reasonable time).[2]

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[2]I am aware of this court's recent decision to deny a respondent's motion to dismiss an otherwise time-barred habeas corpus petition on the ground that the statute of limitations in 28 U.S. C. § 2244 (d)(1) violates the Suspension Clause of the United States Constitution. See Rosa v. Senkowski, No. 97-2468, 1997 WL 436484 (S.D.N.Y. Aug. 1, 1997). However, it appears that Congress has the power to limit the availability of habeas corpus relief by imposing a time limitation on the filing of a petition. See Felker v. Turpin ___ U.S. ___, 116 S.Ct. 2333 (1996); Lonchar v. Thomas, ___ U.S. ___, 116 S.Ct. 1293, 1298 (1996) (habeas corpus can be regulated by formal judicial, statutory, or rule-based doctrines of law).

III. Conclusion

For the foregoing reasons, the habeas petition is dismissed. Given that the petition is time-barred, the merits of petitioner's claims will not be addressed and a certificate of appealability is not warranted. See Reyes v. Keane, 90 F.3d. 676, 680 (2d Cir. 1996).

SO ORDERED:

/s/ Shira A. Scheindlin
Shira A. Scheindlin

Dated: New York, New York
October 29, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of September one thousand nine hundred and ninety-eight,

Present:

Hon. Thomas J. Meskill,
Hon. Pierre N. Leval,
Hon. Chester J. Straub,
Circuit Judges

98-2051

Kevin Brannigan,

Petitioner,

v.

John P. Keane, Superintendent,
Sing Sing Correctional Facility,

Respondent.

A motion having been made herein by petitioner for a certificate of appealability, upon consideration thereof, it is ordered that said motion be and it hereby is denied as moot. In light of this Court's recent decision in Ross v. Artuz, ___

F.3d __, 1998 WL 400446 (2d Cir. June 24, 1998), the district court's dismissal of petitioner's § 2254 petition as time barred under 28 U.S.C. § 2244(d)(1) is vacated and the matter is remanded to the district court for further proceedings.

FOR THE COURT:
Carolyn Clark Campbell, Clerk

By: /s/ Lucille Carr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 1133 (RPP)(JCF)

KEVIN BRANNIGAN,

Petitioner,

-against-

JOHN P. KEANE, Superintendent,
Sing Sing Correctional Facility,

Respondent.

REPORT AND RECOMMENDATION

TO THE HONORABLE ROBERT P. PATTERSON, U.S.D.J.:

Kevin Brannigan has petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction for attempted murder in the second degree, conspiracy in the second degree, criminal possession of a weapon in the second and third degrees, and intimidating a victim or witness in the first degree. Because the petition is time-barred by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1217 (1996), I recommend that it be dismissed.

Background

A. The Trial

Mr. Brannigan was charged with crimes relating to a conspiracy to kill Millicent Moore. Ms. Moore had witnessed three men murder her boyfriend,, Harold Bates. (Tr. at 402).[1] Ms. Moore testified against the men in the grand jury and had agreed to testify at trial. (Tr. at 123-24) During the pendency of the case, one of the arrested men, Ulysses Boyd, was incarcerated in the House of Detention for Men on Rikers Island. (Tr. at 439-41). The petitioner was imprisoned in the same facility at the same time. (Tr. at 437, 452). The two apparently met and agreed that Mr. Brannigan would kill Ms. Moore to prevent her from testifying at trial. (Tr. at 452-53).

Mr. Brannigan was released from custody on November 6, 1986. (Tr. at 438-39). The same day, he sought out Ms. Moore at a location where she normally sold drugs and asked her to "cook" crack cocaine for him. (Tr. at 131, 269-70, 275, 283, 296). She agreed, but then disappeared while the petitioner had left to obtain the cocaine. (Tr. at 132-33, 639, 640-41). When he returned the next day, Ms. Moore refused to join him. (Tr. at 135-38). The following day, Mr. Brannigan returned with four or five men, and again she refused to accompany them. (Tr. at 138-39).

When Mr. Brannigan returned again on November 10, 1986, Ms. Moore finally agreed to cook crack for him and his partner. (Tr. at 141). She entered a cab and travelled with

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[1]"Tr." refers to the trial transcript.

them to 1235 Morris Avenue in the Bronx. (Tr. at 78, 147, 163). While in the building's stairwell, Mr. Brannigan gave her a sample of crack, which she prepared and smoked. (Tr. at 147, 158, 649-51). Then he pulled a gun from his waistband and held it to her temple. (Tr. at 148). He said, "I'm sorry about this. This is for testifying against Gene,"[2] and he shot her twice in the head. (Tr. at 148). Ms. Moore survived and was hospitalized for the next 18 days. (Tr. at 150-51, 153, 843-44). In January 1987, she viewed a photo array and identified Mr. Brannigan as the man who shot her. (Minutes of Pretrial Suppression Hearing ("Suppression Hearing Minutes") at 5, 72). The petitioner was arrested, and Ms. Moore identified him again in a lineup. (Suppression Hearing Minutes at 95-96). Pursuant to the arrest, the police searched the petitioner and seized a bag of marijuana as well as a dollar bill stained with white powder and folded in a way commonly used to carry cocaine. (Suppression Hearing Minutes at 6-8, 85, 99-100).

On January 30, 1987, a New York grand jury charged Mr. Brannigan with single counts of Conspiracy in the Second Degree, N.Y. Penal Law § 105,15, Attempted Murder in the Second Degree, N.Y. Penal Law § 110 & 125.25, and Criminal Possession of a Weapon in the Second and Third Degrees, N.Y. Penal Law § 265.02(4) & 265.03, as well as two counts of Intimidating a Victim or Witness in the First Degree, N.Y. Penal Law § 215.17. New York County Indictment No. 546/87, attached as Exh. A to Respondent's Memorandum of Law in Support of Answer Opposing

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[2]"Gene" was a member of one of the drug gangs implicated in the killing of Harold Bates. (Tr. at 726-29, 765-71).

Petition for a Writ of Habeas Corpus ("Respondent's Memo").

At trial, the defense presented four alibi witnesses -- Mr. Brannigan's mother, brother, and sister and a friend -- who testified that Mr. Brannigan was at his mother's home watching Monday Night Football when Ms. Moore was shot. (Tr. at 1200-13). In rebuttal, the prosecution called Calvin Brown, another friend of the petitioner's. (Tr. at 1612, 1623). The defense objected, arguing that it did not receive timely notice of this witness as required by N.Y. Crim. Proc. Law § 250.20. (Tr. at 1613). The judge overruled this objection, stating that the notice requirement's purpose of preventing unfair surprise did not apply in this situation because the defense had been aware of Calvin Brown as a potential witness. (Tr. 1616-17). In fact, lawyers for the prosecution had only learned of Calvin Brown as a potential witness when they saw his name on the defense's alibi witness list. (Tr. at 1625).

Mr. Brown testified that Mr. Brannigan had asked him to "help in having him released from jail" by corroborating his alibi. (Tr. at 1628). However, Mr. Brown went on to tell the jury that Mr. Brannigan confessed to him that he had shot Ms. Moore in exchange for five thousand dollars. (Tr. at 1629-30). The defense objected to the testimony regarding the confession as improper rebuttal testimony that should have been brought out in the prosecution's direct case. (Tr. at 1630). Defense counsel requested a mistrial, arguing that "even an instruction can['t] cure this." (Tr. at 1633). The court denied the request for a mistrial, but struck the testimony regarding the confession. (Tr. at 1687-88).

The jury found the defendant guilty of all charges. Mr. Brannigan was sentenced as a persistent felony offender to concurrent terms of 15 years to life on the third degree weapons possession count, 20 years to life on the second degree weapons count, and 25 years to life on the remaining counts. Sentencing Commitment Forms in Indictment No. 546/87, Attached as Exh. C to Respondent's Memo.

B. Appeal and Postconviction Motion

On direct appeal to the Appellate Division, First Department, the petitioner contended that: (1) Ms.-Moore's addiction and head injury made her out-of-court identification unreliable, creating reasonable doubt as to guilt; (2) the sentence was excessive, (3) venue did not lie in New York County, and (4) Ms. Moore's out-of- court identification and the property seized from Mr. Brannigan should have been suppressed. Brief for Defendant-Appellant to Appellate Division at 11, 15, 18, 21, attached as Exh. D to Respondent's Memo. Mr. Brannigan filed a pro se supplemental brief claiming a denial of due process due to the court's refusal to grant a mistrial. Pro Se Supplemental Brief for Defendant at 3, attached as Exh. F to Respondent's Memo. The Appellate Division rejected each of these claims and affirmed his conviction. People v. Brannigan, 190 A.D.2d 523, 593 N.Y.S.2d 193 (1st Dep't 1993) (mem.). The New York Court of Appeals denied leave to appeal on May 19, 1993. People v. Brannigan, 81 N.Y.2d 1011, 600 N.Y.S.2d 199 (1993).

Subsequently, on April 6, 1995, I Mr. Brannigan moved pro se to vacate his conviction pursuant to N.Y. Crim. Proc. Law § 440.10 on the grounds that: (1) the prosecution violated the rule of People v. Rosario, 9 N.Y.2d 286, 213

N.Y.S.2d 448 (1961), and his state and federal constitutional rights by failing to notify him prior to trial that Calvin Brown would testify about a confession, and (2) trial counsel's failure to object to this alleged Rosario violation constituted ineffective assistance of counsel. Affidavit in Support of Motion to vacate Judgment of Conviction at 16, 18, 30-33, attached as Ex. J to Respondent's Memo. The trial judge denied the motion on the grounds that: (1) Mr. Brannigan failed to raise the claims on direct appeal, and (2) the claims were meritless because, among other things, the trial court had imposed "the harshest sanction short of dismissal which could have been imposed for this purported Rosario violation" by striking testimony regarding the confession from the record. Decision of Justice Allen Alpert in Indictment No. 546/87, dated June 22, 1995, attached as Exh. L to Respondent's Memo, at 3-4. The Appellate Division denied leave to appeal from this ruling on December 5, 1995. Certificate Denying Leave in Indictment No. 546/87, dated Dec. 5, 1995, attached as Exh. 0 to Respondent's Memo.

C. The Habeas Corpus Petition

On December 27, 1996, Mr. Brannigan executed a pro se petition for federal habeas relief pursuant to 28 U.S.C. § 2254. The petitioner argues that: (1) the prosecution's failure to disclose Rosario material elating to Calvin Brown's testimony deprived him of due process, (2) trial counsel's failure to object to this alleged untimely disclosure and failure to preserve this issue on the record constituted ineffective assistance of trial counsel, (3) appellate counsel's failure to raise the ineffective trial counsel issue constituted ineffective assistance of appellate counsel, and (4) counsel's ineffectiveness at trial deprived him of due process. Pet. at

5-6. In addition to raising each of these claims, the respondent argues that Mr. Brannigan's habeas corpus petition is time-barred by the AEDPA. Respondent's Memo at 5-8.

Discussion

The AEDPA created a one-year filing deadline for federal habeas corpus petitions. This limitations period begins to run when the petitioner's conviction becomes final at the state level, either through (1) conclusion of direct review, or (2) expiration of the time for seeking direct review. 28 U.S. C. § 2244 (d) (1) (A). The limitations period is tolled during the pendency of a properly filed application for state postconviction or collateral review. 28 U.S.C. § 2244(d)(2).

Mr. Brannigan's AEDPA limitations period began to run on May 19, 1993, when the New York Court of Appeals denied his application for leave to appeal the Appellate Division's affirmance of his conviction. See 28 U.S.C. § 2244 (d) (1) (A). The earliest date on which his federal habeas corpus petition could be considered to have been "filed" is December 27, 1996, the date that he executed it. See Houston v. Lack, 487 U.S. 266, 268-76 (1988) (pro se prisoners notices of appeal "filed" at moment of delivery to prison authorities for forwarding to district court, not date on which court receives notice). Thus, Mr. Brannigan's one year limitations period had expired before he filed for habeas corpus relief, and before April 24, 1996, the date the AEDPA was enacted.

The AEDPA limitations period does not absolutely bar petitions by state prisoners, such as Mr. Brannigan, whose

year elapsed before the effective date of the AEDPA. Reyes v. Keane, 90 F.3d 676, 678-79 (2d Cir. 1996). Such petitioners are allowed a "reasonable time" after the AEDPA's enactment to file their petitions. Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir. 1997). While other federal circuit courts have stated that petitioners are entitled to a full one year grace period, see Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), rev'd on other grounds, ___ U.S. ___, 117 S. Ct. 2059 (1997); Calderon v. United States District Court for the Central District of California, 112 F.3d 386, 389 (9th Cir. 1997); United States v. Simmonds, 111 F.3d 737, 746 (10th Cir. 1997); see also Duarte v. Hershberger, 947 F. Supp. 146, 149 (D.N.J. 1996), the Second Circuit has instructed that there is "no need to accord a full year" to prisoners who have had a substantial time to contemplate petitioning for federal habeas relief. Peterson at 93. The Peterson court also cautioned that this standard should not be applied with "undue rigor." Id.

In Peterson, the Court held that a filing 72 days after the effective date was within a reasonable time, but it left the outer limits of the "reasonable time" standard to be worked out on a case-by-case basis. Where prisoners have known the facts underlying their federal habeas corpus claims for an extended period, district courts have dismissed petitions filed after delays short of one year from the AEDPA effective date. See Joseph v. McGinnis, No. 97 Civ. 2969, 1997 WL 531312, at *1 (S.D.N.Y. Aug. 27, 1997) (dismissing petition filed on April 23, 1997, one day short of a year after the AEDPA's enactment and over two years after conclusion of state court direct review); Berger v. Stinson, No. 97 Civ. 6150L, 1997 WL 535227 at *2-3 (W.D.N.Y. Aug. 22, 1997) (eight days short of a year after the AEDPA's enactment and over two years after conclusion of state proceedings); Suarez

v. Stinson, No. 97 Civ. 3039, 1997 WL 462012 at *1 (S.D.N.Y. Aug. 13, 1997) (two days short of a year after effective date and almost nine years after conclusion of state direct review); Maddaloni v. Greiner, No. 97 Civ. 3034, 1997 WL 438801 at *2 (S.D.N.Y. Aug. 5, 1997) (358 days after effective date and almost two years from conclusion of state direct review); Fabelo v. Greiner, No. 97 Civ. 2988, 1997 WL 433477 at *1 (S.D.N.Y. Aug. 1, 1997) (348 days after effective date and more than two years after conclusion of state direct review); Morales v. Portuondo, No. 97 Civ. 2559, 1997 WL 433478 at *1 (S.D.N.Y. Aug. 1. 1997) (335 days after effective date and almost five years after conclusion of state direct review); Lee v. Artuz, 969 F. Supp. 872, 873-74 (S.D.N.Y. 1997) (359 days after effective date and over eight years after conclusion of state direct review).

Six months is the longest delay that has been held to be excusable under Peterson's reasonable time standard. See Rivalta v. Artuz, No. 96 Civ. 8043, 1997 WL 401819, at *1 n.1 (S.D.N.Y. July 16, 1997) (finding that, in light of the "prevailing lenient construction afforded under the AEDPA and the liberal treatment traditionally conferred by this Circuit on pro se parties," petition filed six months after effective date and over seven years after conclusion of state direct review was within "reasonable time"). The other cases in this Circuit in which courts have held delayed petitions timely involved delays closer to the 72 days allowed in Peterson. See Ojeda v. Artuz, No. 96 Civ. 5900, 1997 WL 283398 at *1-2 (S.D.N.Y. May 29, 1997) (petition filed 89 days from effective date); see also Scire v. United States, No. 96 Civ. 3446, 1997 WL 138991 at *4-5 (E.D.N.Y. Mar. 24, 1997) (§ 2555 petition was within "reasonable time" when filed less than three months from effective date).

In determining whether or not a delay oversteps the bounds of Peterson, three factors should be considered. The first is the length of the delay after enactment of the AEDPA: whether it approaches one year or is closer to the delay allowed in Peterson. The second is the reason offered for the delay. For example, a longer delay might potentially be held reasonable if a prisoner failed to receive prompt notice of the AEDPA, was incapacitated during the period after the AEDPA's enactment, or was denied access to legal resources. The third factor to be considered is the time in which the prisoner has been able to "contemplate" his federal habeas corpus claims; that is, the time in which he has-been aware of the facts underlying his claims.

Under this analysis, Mr. Brannigan's delay was unreasonable. He filed his petition over eight months after the AEDPA's effective date. He offers no reason whatsoever for the delay. Furthermore, he has been aware of the factual basis for his habeas corpus claims -- the prosecution's alleged failure to disclose Rosario material relating to Calvin Brown's testimony at least since the end of state court direct review, which was over three and a half years before he filed his petition. Although Mr. Brannigan sought state collateral review, he possessed the necessary information at the time of his direct appeal, as the Appellate Division found. Therefore, he was able to begin preparing his arguments for this habeas corpus petition at least as early as the date on which he was denied leave to appeal to the New York Court of Appeals. Under these circumstances, a delay of over eight months is unjustified.

Based on Rule 9(a) of the Rules Governing Section 2254 cases, the petitioner argues that the court cannot dismiss his petition on the basis of delay absent a showing of

prejudice to the respondent. Reply Affirmation to Respondent Is Motion to Dismiss Application for Federal Habeas Corpus Relief at 4-5. Rule 9 (a) established a laches principle for determining the timeliness of habeas corpus petitions. Although this rule has not been formally repealed since the AEDPA's enactment, it has been effectively overridden by the new statute of limitations. See, e.g., Ojeda, 1997 WL 283398 at *2 n.4. Thus, a respondent need not show prejudice in order to challenge a petition on the grounds that it is barred by the statute of limitations.

Conclusion

For the reasons set forth above, I recommend that Mr. Brannigan's application for a writ of habeas corpus be denied and his petition be dismissed. Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(e) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days to file written objections to this report and recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Robert P. Patterson, Room 2550, and to the chambers of the undersigned, Room 1960, at 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully submitted,

/s/James C. Francis IV
JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
September 26, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 1133 (RPP)(JCF)

KEVIN BRANNIGAN,

Petitioner,

-against-

JOHN P. KEANE, Superintendent,
Sing Sing Correctional Facility,

Respondent.

ORDER ACCEPTING MAGISTRATE'S
REPORT AND RECOMMENDATION

ROBERT P. PATTERSON, JR., U.S.D.J.

This Court has received and reviewed the Report and Recommendation (the "Report") issued by Magistrate Judge James C. Francis IV on September 26, 1997. No timely objections to the Report have been made by the parties to this action. The Court has considered the Report and agrees with its recommendations.

Accordingly, it is hereby

ORDERED that the Report and Recommendation issued by Magistrate Judge Francis on September 26, 1997 is accepted in accordance with 28 U.S.C. § 636(b). Accordingly, it is further

ORDERED that the Petition Brannigan is denied in accordance with the Report. As the petition presents no question of substance for appellate review, a certificate of appealability will not be issued.

Dated: New York, New York
October 28, 1997

/s/Robert P. Patterson, Jr.
ROBERT P. PATTERSON, JR.
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of September one thousand nine hundred and ninety-eight,

Present:

Hon. Thomas J. Meskill,
Hon. Pierre N. Leval,
Hon. Chester J. Straub,
Circuit Judges

97-2536

Timothy Kirby,

Petitioner,

v.

Daniel A. Senkowski,

Respondent.

Motions having been made herein by petitioner for reinstatement of his appeal, a certificate of appealability, in forma pauperis status, and assignment of counsel, upon consideration thereof, it is ordered that reinstatement be granted for the following limited purpose: In light of this

Court's recent decision in Ross v. Artuz, ___ F.3d __, 1998 WL 400446 (2d Cir. June 24, 1998), the district court's dismissal of petitioner's § 2254 petition as time barred under 28 U.S.C. § 2244(d)(1) is vacated and the matter is remanded for a determination of (1) whether petitioner timely filed his petition with prison officials on or before April 24, 1997, see Houston v. Lack, 487 U.S. 266 (1988); Dory v. Ryan, 999 F.2d 679 (2d Cir. 1993), modified on other grounds, 25 F.3d 81 (2d Cir. 1994), and (2) if the petition was timely filed, for a decision on the petition. The motions for certificate of appealability, in forma pauperis status, and assignment of counsel are denied as moot.

FOR THE COURT:
Carolyn Clark Campbell, Clerk

By: /s/ Lucille Carr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 3329 (DC)

TIMOTHY KIRBY,

Petitioner,

-against-

WARDEN DANIEL A. SENKOWSKI,

Respondent.

MEMORANDUM DECISION

CHIN, D.J.

Timothy Kirby has petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner seeks to have this Court set aside his February 17, 1986 conviction for Murder in the Second Degree. For the following reasons I find that the petition is barred by the one-year period of

limitation set forth in 28 U.S.C. § 2244(d)(1), and, thus, the petition is hereby dismissed.[1]

DISCUSSION

Section 101 of the Antiterrorism and Effective Death Penalty Act (the "AEDPA")[2] amended 28 U.S.C. § 2244 to require a one-year period of limitation for the filing of a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period, with certain exceptions, begins to run after the completion of direct review of the judgment by the state courts. 28 U.S.C. § 2244(d)(1)(A). The one-year limitation period in § 2244(d)(1). however, does not apply to habeas petitions filed before the enactment of the AEDPA. Reyes v. Keane, 90 F.3d 676, 679 (2d Cir. 1996). Nevertheless, "where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition," he need not be accorded a full year after the effective date of the AEDPA to file a habeas corpus petition in federal court. Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir. 1997). Rather, the prisoner need only be given a "reasonable" period of time after the effective date of the AEDPA to file his petition. Id.

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[1]Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts allows a court to order summary dismissal of a habeas corpus petition if the petitioner is not entitled to relief in the district court.

[2]The AEDPA, Pub. L. No. 104-132, 1996 U.S. Code Cong. & Ad. News (110 Stat) 1214, was signed by the President, and became effective, on April 24, 1996.

(holding that a petition filed 72 days after the effective date of the AEDPA was filed within a reasonable period of time).

In the present case, state court direct review of petitioner's conviction ended on September 6, 1988. Thus, petitioner took almost nine years to "contemplate" bringing his petition for habeas corpus review. Moreover, petitioner did not file this petition until April 15, 1997 -- 356 days after the effective date of the AEDPA. I find that filing the petition 356 days after the AEDPA took effect did not constitute filing within a "reasonable" period of time. To hold otherwise would have the effect of ignoring the holding of Peterson v. Demskie. Certainly, in determining that there is "no need to accord a full year after the effective date of the AEDPA" for the filing of a petition, the Second Circuit could not have meant to suggest that 356 days -- just nine days shy of a full year -- is required.

CONCLUSION

For the foregoing reasons, the petition is dismissed.

SO ORDERED.

Dated: New York, New York
June 16, 1997

/s/Denny Chin
DENNY CHIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 3329 (DC)

TIMOTHY KIRBY,

Petitioner,

-against-

WARDEN DANIEL A. SENKOWSKI,

Respondent.

MEMORANDUM DECISION

CHIN, D.J.

On June 16, 1997, I issued a memorandum decision dismissing Timothy Kirby's petition for a writ of habeas corpus because the petition was barred by the one-year period of limitation set forth in 28 U.S.C. § 2244(d)(1). Kirby now moves for a certificate of appealability pursuant to 28 U.S.C. §2253(c)(1) and for permission to file his appeal in forma pauperis.

Section 2253(c)(1) states that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken [from the dismissal of a writ of habeas corpus] to the court of appeal . . . ." 28 U.S.C. § 2253(c)(1). Before

a certificate can issue, however, the petitioner must make a "substantial showing" of the denial of a constitutional right. Barefoot v. Estelle, 460 U.S. 880, 892-93 (1983). Petitioner has made no such showing in this case. The petition was dismissed on procedural grounds because it was not filed within a "reasonable" period of time after enactment of 28 U.S.C. § 2244(d)(1) and, thus, was time-barred. Accordingly, petitioner has failed to make a "substantial showing" of the denial of a constitutional right and his motion for a certificate of appealability is denied. In addition, for the same reasons, I find that there is no good faith basis for the appeal. Thus, petitioner's application to proceed with his appeal in forma pauperis is also denied.

SO ORDERED

Dated: New York, New York
August 11, 1997

/s/Denny Chin
DENNY CHIN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of September one thousand nine hundred and ninety-eight,

Present:

Hon. Thomas J. Meskill,
Hon. Pierre N. Leval,
Hon. Chester J. Straub,
Circuit Judges

97-2574

Rafael Oppenheimer,

Petitioner,

v.

Walter R. Kelly, Superintendent,
Attica Correctional Facility,

Respondent.

Motions having been made herein by petitioner for a certificate of appealability, in forma pauperis status, and assignment of counsel, upon consideration thereof, it is ordered that said motions be and they hereby are denied as

moot. In light of this Court's recent decision in Ross v. Artuz, ___ F.3d __, 1998 WL 400446 (2d Cir. June 24, 1998), the district court's dismissal of petitioner's § 2254 petition as time barred under 28 U.S.C. § 2244(d)(1) is vacated and the matter is remanded to the district court for further proceedings.

FOR THE COURT:
Carolyn Clark Campbell, Clerk

By: /s/ Lucille Carr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 3035 (DC)

RAFAEL OPPENHEIMER,

Petitioner,

-against-

WALTER R. KELLY,

Respondent.

MEMORANDUM DECISION

CHIN, D.J.

Rafael Oppenheimer has petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner seeks to have this Court set aside his November 19, 1986 conviction for Attempted First Degree Murder and Second Degree Criminal Possession of a Weapon. For the following reasons I find that the petition is barred by the

one-year period of limitation set forth in 28 U.S.C. § 2244(d)(1), and, thus, the petition is hereby dismissed.[1]

DISCUSSION

Section 101 of the Antiterrorism and Effective Death Penalty Act (the "AEDPA")[2] amended 28 U.S.C. § 2244 to require a one-year period of limitation for the filing of a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period, with certain exceptions, begins to run after the completion of direct review of the judgment by the state courts. 28 U.S.C. § 2244(d)(1)(A). The one-year limitation period in § 2244(d)(1). however, does not apply to habeas petitions filed before the enactment of the AEDPA. Reyes v. Keane, 90 F.3d 676, 679 (2d Cir. 1996). Nevertheless, "where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition," he need not be accorded a full year after the effective date of the AEDPA to file a habeas corpus petition in federal court. Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir. 1997). Rather, the prisoner need only be given a "reasonable" period of time after the effective date of the AEDPA to file his petition. Id.

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[1]Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts allows a court to order summary dismissal of a habeas corpus petition if the petitioner is not entitled to relief in the district court.

[2]The AEDPA, Pub. L. No. 104-132, 1996 U.S. Code Cong. & Ad. News (110 Stat) 1214, was signed by the President, and became effective, on April 24, 1996.

(holding that a petition filed 72 days after the effective date of the AEDPA was filed within a reasonable period of time).

In the present case, state court direct review of petitioner's conviction ended on December 20, 1989. Thus, petitioner took more than seven years to "contemplate" bringing his petition for habeas corpus review. Moreover, petitioner did not file this petition until April 9, 1997 -- 350 days after the effective date of the AEDPA. I find that filing the petition 350 days after the AEDPA took effect did not constitute filing within a "reasonable" period of time. To hold otherwise would have the effect of ignoring the holding of Peterson v. Demskie. Certainly, in determining that there is "no need to accord a full year after the effective date of the AEDPA" for the filing of a petition, the Second Circuit could not have meant to suggest that 350 days -- just fifteen days shy of a full year -- is required.

CONCLUSION

For the foregoing reasons, the petition is dismissed.

SO ORDERED.
Dated: New York, New York
June 25, 1997

/s/Denny Chin
DENNY CHIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 3035 (DC)

RAFAEL OPPENHEIMER,

Petitioner,

-against-

WALTER R. KELLY,

Respondent.

MEMORANDUM DECISION

CHIN, D.J.

On June 25, 1997, I issued a memorandum decision dismissing Rafael Oppenheimer's petition for a writ of habeas corpus because the petition was barred by the one-year period of limitation set forth in 28 U.S.C. § 2244(d)(1). Oppenheimer now moves for a certificate of appealability pursuant to 28 U.S.C. §2253(c)(1) and for permission to file his appeal in forma pauperis.

Section 2253(c)(1) states that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken [from the dismissal of a writ of habeas corpus]

to the court of appeal . . . ." 28 U.S.C. § 2253(c)(1). Before a certificate can issue, however, the petitioner must make a "substantial showing" of the denial of a constitutional right. Barefoot v. Estelle, 460 U.S. 880, 892-93 (1983). Petitioner has made no such showing in this case. The petition was dismissed on procedural grounds because it was not filed within a "reasonable" period of time after enactment of 28 U.S.C. § 2244(d)(1) and, thus, was time-barred. Accordingly, petitioner has failed to make a "substantial showing" of the denial of a constitutional right and his motion for a certificate of appealability is denied. Moreover, because I find that there is no good faith basis for the appeal, petitioner's application to proceed in forma pauperis is denied.

SO ORDERED.

Dated: New York, New York
August 18, 1997

/s/Denny Chin
DENNY CHIN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of September one thousand nine hundred and ninety-eight,

Present:

Hon. Thomas J. Meskill,
Hon. Pierre N. Leval,
Hon. Chester J. Straub,
Circuit Judges

97-2795

Eduardo La Torres,

Petitioner,

v.

Hans G. Walker,
Superintendent, Auburn
Correctional Facility,

Respondent.

Motions having been made herein by petitioner for reinstatement of the appeal, a certificate of appealability, in forma pauperis status, and assignment of counsel, upon

consideration thereof, it is ordered that said motions be and they hereby are denied as moot. In light of this Court's recent decision in Ross v. Artuz, ___ F.3d __, 1998 WL 400446 (2d Cir. June 24, 1998), the district court's dismissal of petitioner's § 2254 petition as time barred under 28 U.S.C. § 2244(d)(1) is vacated and the matter is remanded for a determination of (1) whether petitioner timely filed his petition with prison officials on or before April 24, 1997, see Houston v. Lack, 487 U.S. 266 (1988); Dory v. Ryan, 999 F.2d 679 (2d Cir. 1993), modified on other grounds, 25 F.3d 81 (2d Cir. 1994), and (2) if the petition was timely filed, for a decision on the petition.

FOR THE COURT:
Carolyn Clark Campbell, Clerk

By: /s/ Lucille Carr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 3392 (SAS)

EDUARDO LATORRES,

Petitioner,

- against -

HANS WALKER, Superintendent of
Auburn Correctional Facility, and
DENNIS VACCO, Attorney General of
The State of New York,

Respondents.

SHIRA A. SCHEINDLIN, U.S.D.J.:

Pro se petitioner Eduardo LaTorres Filed this habeas petition pursuant to 28 U.S.C. § 2254, challenging his 1991 conviction on two counts of Attempted Murder in the First Degree, Criminal Possession of a Weapon in the Second and Third Degrees, and Reckless Endangerment in the First Degree. Respondent moves to dismiss the habeas petition as untimely. For the reasons set forth below, the petition is dismissed.

I. Procedural History

On March 7, 1991, petitioner was convicted in the Supreme Court of New York, New York County. The court sentenced the petitioner to two consecutive indeterminate prison term of from twenty years to life on the attempted murder counts and lesser terms for the remaining counts to run concurrently with the consecutive terms imposed on the attempted murder counts. See Petition for Writ of Habeas Corpus, dated August 11, 1997, ("Pet.") at p. 2. On October 27, 1992, the Appellate Division, First Department, unanimously affirmed the petitioner's conviction. See People v. LaTorres, 186 A.D.2d 479 (1st Dept. 1992). The New York State Court of Appeals denied petitioner leave to appeal on February 2, 1993. See People v. LaTorres, 81 N.Y.2d 842 (1993). Subsequently, on May 14, 1993, the New York State Court of Appeals denied petitioner's motion to reconsider the denial of leave. See People v. LaTorres, 81 N.Y.2d 1015 (1993). On February 16, 1995, the Appellate Division, First Department, denied petitioner's motion to reargue the October 27, 1992 decision. See Respondent's Memorandum of Law, dated July 21, 1997, Ex. F.

On April 28, 1997, the habeas petition dated April 11, 1997, was received by the Court. Petitioner urges that his conviction should be reversed because the verdict was not supported by sufficient evidence to convict and that the court (1) failed to conduct a probing inquiry before excusing a sworn juror; (2) improperly dismissed the sworn juror during a robing room hearing in which the petitioner was absent; (3) erroneously allowed the introduction of evidence of several uncharged crimes in the case-in-chief against the petitioner; (4) improperly admitted into evidence during the case-in-chief the Grand Jury testimony of a witness who had been

killed before the trial; (5) wrongly interrupted the deliberating jury to ask if a partial verdict had been reached; (6) improperly injected itself into the proceedings; and (7) wrongly imposed consecutive sentences on the petitioner for the two attempted murder convictions. See Pet. Ex. C.[1]

II. Discussion

Rather than address petitioner's claim on their merits, respondent moves to dismiss LaTorres' petition as untimely. The Antiterrorism and Effective Death Penalty Act ("AEDPA"), which became effective on April 24, 1996, amended 28 U.S.C. § 2244 by imposing a one-year statute of limitations for the filing of a habeas corpus petition seeking relief from a state court conviction. The limitation period, with certain exceptions, begins to run after the completion of direct review of the judgment by state courts. 28 U.S.C. § 2244(d)(1)(A). This one year limitation period does not apply in cases where, as here, the judgment of conviction became final before April 24, 1996, the effective date of AEDPA. In these circumstances, the Second Circuit has held that such a habeas petition must be filed within a "reasonable time" after that date. Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir. 1997). While the Second Circuit has not defined what constitutes a "reasonable time," it stated that when a prisoner has had "several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year after the effective date of the AEDPA." Id. at 93.

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[1]Petitioner's arguments in his habeas petition are the same as those raised before the Appellate Division, First Department. See Pet. Ex. A.

This habeas corpus petition was filed, at the earliest, on April 11, 1997,[2] 352 days after the effective date of AEDPA, nearly four years after the New York State Court of Appeals denied petitioner's leave application and nearly two years after the Appellate Division denied petitioner's motion to reargue the case. When a conviction becomes final before the effective date of the AEDPA (April 24, 1996), the Court of Appeals for the Second Circuit has already held that a petitioner is entitled to a "reasonable time" subsequent to the effective date of the AEDPA in which to file a habeas petition, but not to an entire year. See Peterson, 107 F.3d at 93. Moreover, petitioner has offered no reason for his delay in filing. In short, 352 days does not constitute a "reasonable time" within the meaning of AEDPA. Accord Yeung v. Artuz, No. 97-3288, 1997 WL 572908 (S.D.N.Y. Sept. 10, 1997) (petition dated 328 days after effective date of AEDPA time barred); Joseph v. McGinnis, No. 97-2969, 1997 WL 531312 (S.D.N.Y. Aug. 27, 1997) (petition filed 364 days after effective date of AEDPA untimely); Fabelo v. Greiner, No. 97-2988, 1997 WL 433477, at *3 (S.D.N.Y. Aug. 1, 1997) (filing 348 days after the effective date of AEDPA untimely); Morales v. Portuondo, No. 97-2559, 1997 WL

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[2]Where a petitioner is proceeding pro se, the prisoner is deemed to have filed a document when he or she delivers it to a prison authority for forwarding to the clerk of the court. See Houston v. Lack, 487 U.S. 266 (1988). Here, the petition was received by the Pro Se Office on April 28, 1997, and was filed by the Clerk's Office on May 8, 1997. While there is no indication when the petition was delivered to prison authorities, as the petition was dated April 11, 1997, it could not have been delivered to the authorities before that date.

43478, (S.D.N.Y. Aug. 1, 1997) (filing 335 days after effective date of AEDPA time barred); Oppenheimer v. Kelly, No. 97-3035, 1997 WL 362216, at *1 (S.D.N.Y. June 27, 1997) (filing 350 days after the effective date unreasonable). But see Ojeda v. Artuz, No. 97-5900, 1997 WL 283398 (S.D.N.Y. May 29, 1997) (filing 89 days after effective date of AEDPA timely); Rivalta v. Artuz, No. 97-8043, 1997 WL 401819 (S.D.N.Y. July 16, 1997) (filing six months after effective date of AEDPA is within reasonable time).[3]

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[3]I am aware of this court's recent decision to deny a respondent's motion to dismiss an otherwise time-barred habeas corpus petition on the ground that the statute of limitations in 28 U.S.C. § 2244(d)(1) violates the Suspension Clause of the United States Constitution. See Rosa v. Senkowski, 1997 WL 436484, (S.D.N.Y. 1997). However, it appears that Congress has the power to limit the availability of habeas corpus relief by imposing a time limitation on the filing of a petition. See Felker v. Turpin, ___ U.S. ___, 116 S.Ct. 2333 (1996); Lonchar v. Thomas, _ U.S. __, 116 S.Ct. 1293, 1298 (1996) (habeas corpus can be regulated by formal judicial, statutory, or rule-based doctrines of law).

III. Conclusion

For the foregoing reasons, the habeas petition is dismissed. Given that the petition is time-barred, the merits of petitioner's claims will not be addressed and a certificate of appealability is not warranted. See Reyes v. Keane, 90 F.3d 676, 680 (2d Cir. 1996).

SO ORDERED:

/s/ Shira A. Scheindlin
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
September 29, 1997

ORIGINAL

Supreme Court, U.S.
FILED
JAN 21 1999
CLERK

98-1045
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER ARTUZ, Superintendent
Green Haven Correctional Facility
Petitioner,

-against-

ADALBERTO FERNANDEZ
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 39.1 of the Rules of this Court, motion is hereby made that respondent be allowed to proceed in forma pauperis. Respondent's declaration in compliance with 28 U.S.C. § 1746 is attached to this motion. Leave to proceed in forma pauperis was sought and obtained in both courts below.

Dated: Stormville, New York
January 19, 1999

Adalberto Fernandez
88-T-1851 Pro Se
Route 216 Drawer B
Stormville, N.Y. 12582-0010

98-1045
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER ARTUZ, Superintendent
Green Haven Correctional Facility
Petitioner,

-against-

ADALBERTO FERNANDEZ
Respondent.

DECLARATION IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, **ADALBERTO FERNANDEZ** declare that I am the respondent in the above-entitled case, that in support of my Motion for Leave to Proceed In Forma Pauperis, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further declare that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes __X__ No _____

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   $21.00 dollars per month and the employer is Green Haven Correctional Facility.

   b. If the answer is no, state the date of your last employment and amount of the salary or wages per month which you received.

   N/A

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?

   Yes __X__ No _____

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

   Received gifts totalling $60.00 for birthday and holidays from relatives.

3. Do you own any cash or checking or savings account?

Yes _____ No X

a. If the answer is yes, state the total value of the items owned.

N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes _____ No X

a. If the answer is yes, describe the property and state its approximate value.

N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Two sons, one is in the Dominican Republic.

6. I declare under penalty of perjury that the foregoing is true and correct, and I understand that a false statement or answer to any question in this declaration will subject me to penalties for perjury.

/s/ Adalberto Fernandez

Adalberto Fernandez Pro Se

Executed this 19th day of January, 1999

ORIGINAL

Supreme Court, U.S.
FILED
JAN 21 1999
CLERK

98-1045

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CHRISTOPHER ARTUZ, Superintendent
Green Haven Correctional Facility
Petitioner,

-against-

ADALBERTO FERNANDEZ
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Consideration Governing Review on Cetiorari

Petitioner Claims the reasons for granting the writ are whether the Second Circuit has arrogated to itself Jurisdiction denied it by Congress over the custody of state prisoners without complying with 28 U.S.C. Section 2253 (C) leaves the law in substantial confusion. And whether Federal Courts are free to enlarge the limitation periods set by congress.

Under rule 10(C) one of the considerations governing review is whether a United States Court of Appeals ahs decided an important federal question in a way that conflicts with relevant decisions of thi court. Respondent claims it has not and the confusion has been justifiably satisfied in the Second Circuit

Court of Appeals, and is in agreement with all the Circuit Courts throughout the country, which allow the one year grace period.

STATEMENT OF THE CASE

Apparently not satisfied with the vast reductions in authority imposed on the courts by prior Judicial determinations, and the review standards contained in Public Law 104-132 Antiterrorism and Effective Death Penalty Act, Hereinafter referred to as AEDPA.

The state argues for the most constrictive, retroactive interpretation of the one year filing limitation contained in the Amendments to 28 U.S.C. 2254 possible. Something that commentators have noted, at times, criticized the hastily drawn, and ambiguous nature of the statute.

In any event, the state now argues, the one year filing period, clearly a procedure limitation, should apply retroactively, thereby barring Federal Habeas Corpus Review of this conviction. Whether the Second Circuit has arrogated to itself Jurisdiction denied it by congress over the custody of state prisoners andwhether Federal Courts are free to enlarge the limitation periods set by congress.

REASONS TO DENY THE WRIT

Any reliance upon Peterson v. Demskie 107 F.3rd 92 (2nd Cir 1997) in support of the states position is misplaced. Either the one year provision is retroactive, thereby barring the commencement of the proceeding, or it is not!

There is absolutely no provision for an extension based upon a case by case analysis of the number of days before the eventual filings what was contemplated by Peterson, is a Rule 9 analysis of due diligence, which of course survives the enactment of the amendments in question. When the AEDPA was passed on April 24, 1996 I filed my Habeas Petition 348 days after, regardless of the new evidence I was seeking at the time of the bill. I elected to bring my argument before the one year ran out as I understood it, to the District Court.

RECENT OPINION

In Ross v. Artuz 150 F.3rd 97 (1998) the Second Circuit, created a one-year grace period, retroactive to the April 24, 1996, effective date of the AEDPA. Under that rule, no Habeas Corpus Application brought before April 24, 1997, was to be dismissed by application of Section 2244 (d).

After the Ross case the District Court denied my request for Certificate of Appealability I then appealed to the Second Circuit

citing Ross v. Artuz and the effective date of the AEDPA and on September 25, 1998 this Second Circuit ordered in light of the courts recent decision in Ross v. Artuz __F.3rd__ 1998 WL 4000446 (2nd Cir. June 24, 1998) the District Courts dismissal of petitioners §2254 petition as time barred under 28 U.S.C. §2254 (d)(1) is vacated and the matter is remanded to the District Court

for further proceedings.

I Strongly submit, these issue's are not truly proffered in good faith by the petitioner, and strangely, their arguing same is truly indicative, or their concept of fundamental fairness, which permeates all of the issues presented below for review.

Yours, etc
Adalberto Fernandez
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(COA2 DKT 98-2574)
Drawer B
Stormville, N.Y. 12582

TO: Office of District Attorney
ADA Marc Frazier Scholl
One Hogan Place
New York, N.Y. 10013

98-1045

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER ARTUZ, Superintendent
Green Haven Correctional Facility
Petitioner,

-against-

PROOF OF SERVICE

ADALBERTO FERNANDEZ
Respondent.

I, **ADALBERTO FERNANDEZ** have mailed a copy of my opposition to a writ of Certoriari, by placing a postmarked envelope to the prison mail room, at Green Haven Correctional Facility where I am incarcerated, to the following parties: 1. Solicitor General of the United States, Room 5614, Department of Justice 950 Pennsylvania Avenue N.W Washington DC 20530-0001. 2. Marc Frazier Scholl, ADA New York County, One Hogan Place New York, New York 10013 (212) 335-9000

Dated: January 19, 1999

ADALBERTO FERNANDEZ
88T1851 Pro Se
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Supreme Court, U.S.
FILED
JAN 29 1999
CLERK

No. 98-1045

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CHRISTOPHER ARTUZ, Superintendent,

Petitioner,

v.

ADALBERTO FERNANDEZ,

Respondent;

DANIEL SENKOWSKI, Superintendent,

Petitioner,

v.

TIMOTHY KIRBY,

Respondent.

BRIEF IN OPPOSITION

Mr. Timothy Kirby
Timothy Kirby, Pro Se
No. 86-A-6806
Auburn Correctional
Facility
P.O. Box 618
Auburn, New York 13024

REASONS FOR DENYING THE WRIT

The state's first question presented is at best a question of form and not substance, and is plainly not a matter upon which certiorari should be granted. The state fastens upon the peculiarities of a summary order used by the Second Circuit to remand some of the hundreds of appeals pending in the wake of Peterson v. Demskie, 107 F.3d 92 (2d Cir. 1997), see Petition at 8, and argues that the failure of the court to grant a certificate of appealability, instead of remanding summarily and denying the request for a certificate as moot, was error that requires this Court's plenary consideration. The "error," if there was one, was plainly harmless, however, for the Court of Appeals implicitly found that the prerequisites for a certificate were met by remanding in light of Ross v. Artuz, 150 F.3d 97 (2d Cir. 1998).

For the Circuit to issue a certificate, it had to find that the habeas petitioner had made a "substantial showing of the denial of a constitutional right." In the Ross case, which considered the same issue raised by Respondent Timothy Kirby on his appeal in the Second Circuit, Judge Kearse specifically found that habeas petitioners had a constitutional right to a reasonable time in which to file their habeas petitions after enactment of the AEDPA and determined that one year was the reasonable time required. 150 F.3d at 100, 103. Thus, the holding in Ross established that there was not only a "substantial" constitutional question in the case, but a meritorious one. By remanding in light of Ross, the Circuit

plainly incorporated this finding, and implicitly granted the certificate.

Certiorari should be denied for two other reasons. First, the state waived this formal error by not objecting to it before the Second Circuit. Had the state done so, the Circuit would certainly have granted the certificate and then remanded in light of Ross. Second, even if this Court grants certiorari, on remand, the Second Circuit will simply be able to grant the certificate and the case will proceed as it is. The state's claim is frivolous.

The state's second ground is equally frivolous. Every circuit to consider the question has agreed with the Second Circuit in Ross v. Artuz, supra, that the required grace period for filing a petition of habeas corpus after enactment of the AEDPA was one year. Petitioner admits this. Petition at 15-16. Not only is the opinion on this issue unanimous among the Circuits, but it is clearly correct. Judge Kearse's well-reasoned opinion in Ross demonstrates that there was no error in the court below, and no basis for this Court to grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Mr. Timothy Kirby

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